

January 2017

The First Wartime Water Torture by Americans

Allan W. Vestal

Follow this and additional works at: <https://digitalcommons.minelaw.maine.edu/mlr>



Part of the [Law and Politics Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Allan W. Vestal, *The First Wartime Water Torture by Americans*, 69 Me. L. Rev. 1 (2017).

Available at: <https://digitalcommons.minelaw.maine.edu/mlr/vol69/iss1/2>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

THE FIRST WARTIE WATER TORTURE BY AMERICANS

Allan W. Vestal

- I. INTRODUCTION: "NOW THE TERRIBLE NIGHT HAS RETURNED"
- II. FULL DISCLOSURE: WATER TORTURE IN THE PHILIPPINE-AMERICAN WAR
- III. FAIR PUNISHMENT: LEGAL CONSEQUENCES OF WATER TORTURE IN THE PHILIPPINE-AMERICAN WAR
 - A. *Major Edwin F. Glenn*
 - B. *Lieutenant Arthur L. Conger*
 - C. *Lieutenant Julien E. Gaujot*
 - D. *Captain James A. Ryan*
 - E. *Captain Cornelius M. Brownell*
 - F. *Lieutenant Frederick B. Hennessy*
 - G. *Lieutenant Edwin E. Hickman*
 - H. *Sergeant Januarius Manning*
 - I. *Captain Samuels*
 - J. *Lieutenant L. W. Caffey*
- IV. STRONG PREVENTION: REFORM AFTER THE PHILIPPINE-AMERICAN WAR
- V. CONCLUSION: "NO MORE THAN A MATTER OF OPPORTUNITY AND OCCASION"?



Chorus in Background: Those Pious Yankees Can't Throw Stones at us Any More.

THE FIRST WARTIME WATER TORTURE BY AMERICANS

*Allan W. Vestal**

I. INTRODUCTION: "NOW THE TERRIBLE NIGHT HAS RETURNED"

In 1957, during the Algerian War, journalist Henri Alleg was held for a month and tortured by French paratroopers at the infamous military prison at El-Biar. His account of the water torture was smuggled out of prison and published:

[H]e turned on the tap. The rag was soaked rapidly. Water flowed everywhere: in my mouth, in my nose, all over my face. But for a while I could still breathe in some small gulps of air. I tried, by contracting my throat, to take in as little water as possible and to resist suffocation by keeping air in my lungs for as long as I could. But I couldn't hold on for more than a few moments. I had the impression of drowning, and a terrible agony, that of death itself, took possession of me. In spite of myself, all the muscles of my body struggled uselessly to save me from suffocation. In spite of myself, the fingers of my two hands shook uncontrollably. "That's it! He's going to talk," said a voice.¹

* Professor, Drake University Law School. The image is from the Life magazine cover of May 22, 1902.

1. HENRI ALLEG, *THE QUESTION* 49 (2006).

Alleg's is one of a small number of first-person accounts of water torture.² Its publication created a sensation in France, whose military tried to suppress Alleg's story. Jean-Paul Sartre wrote an introduction to Alleg's book. In it he spoke of the national history that magnified the pain of French atrocities in Algeria:

In 1943, in the . . . Gestapo headquarters in Paris . . . Frenchmen were screaming in agony and pain: all France could hear them. In those days the outcome of the war was uncertain[,] the future unthinkable, but one thing seemed impossible in any circumstances: that one day men should be made to scream by those acting in our name.

There is no such word as impossible: in 1958, in Algiers, people are tortured regularly and systematically

Appalled, the French are discovering this terrible truth: that if nothing can protect a nation against itself, neither its traditions nor its loyalties nor its laws, and if fifteen years are enough to transform victims into executioners, then its behaviour is no more than a matter of opportunity and occasion. Anybody, at any time, may equally find himself victim or executioner

Now the terrible night has returned: at El Biar, it returns every night: in France, it is the ashes in our hearts³

From the attacks of September 11, 2001, to the end of the Bush-Cheney Administration, we, not the French, faced the prospect that people were tortured in our name. We, not the French, were in danger of forgetting our national history. Some of our leaders acknowledged this peril. As the Senate Intelligence Committee released its study highly critical of the Central Intelligence Agency's detention and coercive interrogation programs, its Chair, Senator Dianne Feinstein, hoped that we not forget our history:

It is my sincere and deep hope that . . . U.S. policy will never again allow for secret indefinite detention and the use of coercive interrogations We cannot again allow history to be forgotten and grievous past mistakes to be repeated.⁴

Among the grievous past mistakes we ought not forget is the first episode of wartime water torture by Americans. It happened a century before the attacks of September 11, 2001, when American soldiers and their indigenous allies used the "water cure" to extract information from prisoners and civilians and to punish them for opposing the American occupation of their nation. Our soldiers and their minions first used water torture on prisoners and civilians during the Philippine-American War of 1899 to 1902.⁵

2. I distinguish between Alleg, who was water tortured for operational intelligence with which to persecute other members of the *Parti Communiste Algérien*, and journalists who are water tortured voluntarily for purposes of research. See, e.g., Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR, Jul. 2, 2008.

3. ALLEG, *supra* note 1, at xxvii-xxix.

4. *Senate Select Committee on Intelligence, 113th Cong., Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Forward at 3 (Approved December 13, 2012, Updated for Release April 3, 2014, Declassification Revisions December 3, 2014) [hereinafter *Select Committee Report*].

5. This discussion raises a question of nomenclature. References to the "Philippine Insurrection" would suggest that the Filipinos were fighting against an American presence in the Philippines duly constituted under the 1898 Treaty of Paris. References to the "Philippine-American War" would suggest

Examples from the historical record suggest the brutality of American practice in the Philippines, both as to the use of water torture and the broader pattern of behavior. Sergeant Edward J. Davis of Massachusetts testified before a Senate committee⁶ about the water torture of Joveniano Ealdama,⁷ the mayor of the town of Igaras, in Iloilo province on Panay, on November 27, 1900:

Sergeant Davis. [The mayor] was taken out into a big hall in the convent there, his clothes were all taken off, his hands were tied behind him, and he was asked for information He would not give this information, so they took him to this water tank. It was a tank holding about a hundred gallons of water. They held him under the faucet and he was made to take this water into his mouth at the command of Captain Glenn

Senator Rawlins. How was his mouth kept open?

A. It was kept open with a stick

Q. And after he was filled up with water, what else was done with him?

A. After they filled him up with water he swelled way up and then these two soldiers would roll the water out of him. They had an interpreter over him and they asked him if he would tell what information they were after. He told some, and then after they released him . . . they wanted further information out of him . . . and he would not give it. So they took him down right there and they took a syringe and squirted water up his nostrils. He would not give the information then and they put salt in the water. Then he was willing to tell.⁸

Sergeant Davis testified to the Senate committee that at the time Joveniano Ealdama was tortured, Davis had been in Igaras about seven months, that the American troops had no trouble there, that no attacks had been made on the

the opposite, that the First Philippine Republic was the legitimate authority in the Philippines pursuant to the 1898 Philippine Declaration of Independence. Francis A. Brooks, *Unauthorized and Unlawful Subjugation of Filipinos in the Island of Luzon by President McKinley* 10 (1900) (“It follows as a matter of course, if United States laws were not in force in the Philippine islands in December, 1898, or at any time since then, that there could be no rebellion or insurrection there”). I follow the evident usage of the United States Department of State, and my own beliefs, and refer to the conflict as the Philippine-American War. United States Department of State Office of the Historian, *The Philippine-American War, 1899-1902*, MILESTONES: 1899-1913, <http://history.state.gov/milestones/1899-1913/war> (last visited Jan. 28, 2015).

6. *Affairs in the Philippine Islands, Hearings Before the Comm. on the Phil. of the U.S.S.*, 57th Cong. (1902) [hereinafter *Lodge Committee Hearings*].

7. Ealdama’s first name is occasionally given as “Tobeniano.” See, e.g., Paul Kramer, *The Water Cure: Debating Torture and Counterinsurgency – A Century Ago*, THE NEW YORKER (Feb. 25, 2008) <http://www.newyorker.com/magazine/2008/02/25/the-water-cure>; LOUISE BARNETT, ATROCITY AND AMERICAN MILITARY JUSTICE IN SOUTHEAST ASIA: TRIAL BY ARMY 92 (2010). The problem is compounded in official documents. See, e.g., General Orders, No. 87, Adjutant General’s Office, Headquarters of the Army, July 26, 1902 (report of first court-martial of Major Edwin F. Glenn, listing victim of water cure at “Igaras” as “Tobeniano Ealdama”); *Letter From the Secretary of War in Response to Senate Resolution of February 23, 1903, Transmitting a Report Showing the Trials or Courts-Martial Had in the Philippine Islands I Consequence of the Instructions Communicated to Major-General Chaffee on April 15, 1902, Together With the Action of the President or the Secretary of War Thereon*, March 3, 1903, 57th Cong. [hereinafter *Secretary of War Report of March, 1903*] (“Tobeniano Ealdama”). But apparently “Joveniano” is correct. Michael Tan, *Names, dates*, THE PHILIPPINE DAILY INQUIRER, Apr. 16, 2008 (Ealdama’s great-grandson confirming that “Joveniano” is correct).

8. *Lodge Committee Hearings*, *supra* note 6, at 1726-28; see also GREGG JONES, HONOR IN THE DUST: THEODORE ROOSEVELT, WAR IN THE PHILIPPINES, AND THE RISE AND FALL OF AMERICA’S IMPERIAL DREAM 1-2, 212-13 (2012).

Americans, that no American soldiers had been wounded or killed, and that no offense had been given by the inhabitants to the soldiers.⁹ The day after the water torture of Ealdama, the American troops put Igbaras, a town of ten thousand residents, to the torch.¹⁰

By the spring of 1902, accounts of atrocities by American soldiers in the Philippines, including as a central element of the narrative stories of water torture, had widely circulated in the United States.¹¹ Through testimony before a Senate committee, the fact of water torture by officers and enlisted men of the Army was being established. The nation looked to President Theodore Roosevelt for an announcement of how the administration would respond to the accounts of torture.

In his Memorial Day address of May 30, 1902, President Roosevelt identified the path he proposed to take.¹² Speaking to Union veterans of the Civil War at Arlington Cemetery, he publicly addressed the question of war crimes by American soldiers in the Philippines.¹³ In doing so, Roosevelt returned to policy declarations made six weeks earlier in a private communication from the War Department on behalf of the Secretary of War, Elihu Root and President Roosevelt to the military governor of the Philippines, Major-General Adna Chaffee.¹⁴

To the assembled Civil War veterans President Roosevelt noted the provenance of the rules of warfare, coming from President Abraham Lincoln.¹⁵ He acknowledged that some American soldiers had committed “acts of cruelty” in the Philippines,¹⁶ which he sought to put into context in two ways. First, Roosevelt noted

9. *Lodge Committee Hearings*, *supra* note 6, at 1728.

10. *Id.* at 1729. Sergeant Davis testified that the mayor was subjected to water torture, and the town was burned, upon the orders of Captain Edwin F. Glenn, the judge-advocate of the administrative department. *Id.*

11. Richard E. Welch, Jr., *American Atrocities in the Philippines: The Indictment and the Response*, 43 THE PACIFIC HISTORICAL REVIEW 233, 234 (May, 1974); *see also* Frederic L. Borch, *From Frontier Cavalryman to the World Stage: The Career of Army Judge Advocate General George B. Davis*, ARMY HISTORY 7 at 13 (Winter 2010).

12. One historian identifies President Roosevelt’s Memorial Day speech as part of a “counterattack” against anti-imperialist demands for a broader and more public investigation of atrocities in the Philippines than that of the Lodge Committee. The same writer does not mention the three-part program announced in the Memorial Day speech. Welch, *supra* note 11, at 244; JONES, *supra* note 8, at 322-23.

13. President Theodore Roosevelt, U.S. President, Memorial Day Address (May 30, 1902), *available at* <http://www.theodore-roosevelt.com/images/research/txtspeeches/11.txt> (the “Roosevelt Memorial Day Address”).

14. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN AND CONDITIONS GROWING OUT OF THE SAME; INCLUDING THE INSURRECTION IN THE PHILIPPINE ISLANDS AND THE CHINA RELIEF EXPEDITION, BETWEEN THE ADJUTANT-GENERAL OF THE ARMY AND MILITARY COMMANDERS IN THE UNITED STATES, CUBA, PORTO RICO, CHINA, AND THE PHILIPPINE ISLANDS, FROM APRIL 15, 1898 TO JULY 30, 1902, at 1327-28 (Washington, vol. 2. 1902) [hereinafter CORRESPONDENCE RELATING TO THE WAR WITH SPAIN] (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee). While General Corbin sent the communication “By direction of the Secretary of War,” the language of the cable (“The President desires to know . . .,” “the President intends to back up the army . . . he also intends . . .”) confirms that it represented the thoughts of the President and the Secretary of War. *Id.*

15. Roosevelt Memorial Day Address, *supra* note 13 (“The rules of warfare . . . accepted as the basis of conduct by our troops in the field are the rules laid down by Abraham Lincoln when you, my hearers, were fighting for the Union.”).

16. *Id.* (“I deeply deplore to say that some among [the American soldiers in the Philippines] have so far forgotten themselves as to counsel and commit . . . acts of cruelty.”); *see also* CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1328 (Washington, vol. 2. 1902) (“[T]he violations

that the Filipino nationalists committed atrocities on American soldiers and upon Filipinos who did not support the nationalist cause,¹⁷ although the President appropriately stated that such conduct did not excuse acts of cruelty by American soldiers.¹⁸ Second, the President stressed the small number of American atrocities contrasted with the large number of counterbalancing actions by individual American soldiers.¹⁹ Despite the actions of the Filipino nationalists, despite the small number of cruelties by American soldiers, the President expressed regret: “We deeply and bitterly regret that they should have been committed, no matter how rarely, no matter under what provocation, by American troops.”²⁰

President Roosevelt announced a three-part course of action to address the war crimes of American soldiers in the Philippines:

Determined and unswerving effort must be made, and has been and is being made, to find out every instance of barbarity on the part of our troops, to punish those guilty of it, and to take, if possible, even stronger measures than have already been taken to minimize or prevent the occurrence of all such acts in the future.²¹

President Roosevelt’s first imperative was to discover and acknowledge every instance of cruelty and barbarity. The earlier communication spoke of the “necessity of [a] most thorough and searching and exhaustive investigation . . . to uncover every such case which may have occurred,” and declared: “The President desires to know

of law and humanity, of which these cases, if true, are examples . . .”) (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee).

17. Roosevelt Memorial Day Address, *supra* note 13 (“[F]or every guilty act committed by one of our troops a hundred acts of far greater atrocity have been committed by the hostile natives upon our troops, or upon the peaceable and law-abiding natives who are friendly to us”); *see also* CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1328 (Washington, vol. 2. 1902) (“[F]oes who habitually resort to treachery, murder, and torture against our men”) (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee).

18. Roosevelt Memorial Day Address, *supra* note 13 (Filipino nationalist atrocities “can not be held to excuse any wrong doers on our side.”); *see also* CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1328 (“Great as the provocation has been . . . nothing can justify or will be held to justify the use of torture or inhuman conduct of any kind on the part of the American Army.”) (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee).

19. Roosevelt Memorial Day Address, *supra* note 13 (“The fact really is that our warfare in the Philippines has been carried on with singular humanity. For every act of cruelty by our men there have been innumerable acts of forbearance, magnanimity, and generous kindness The cruelties on our part have been wholly exceptional.”); *see also* CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1328 (“It is believed the violations of law and humanity . . . will prove to be few and occasional and not to characterize the conduct of the army generally in the Philippine Islands”) (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee).

20. Roosevelt Memorial Day Address, *supra* note 13; *see also* Borch, *supra* note 11, at 15 (“[T]he president . . . declared in a speech at Arlington National Cemetery . . . that the use of torture was deplorable.”).

21. Even as he called for punishing the guilty, Roosevelt apparently could not resist taking a shot at those not in the arena.

The guilty are to be punished; but in punishing them, let those who sit at ease at home, who walk delicately and live in the soft places of the earth, remember also to do them common justice. Let not the effortless and the untempted rail overmuch at strong men who with blood and sweat face years of toil and days of agony, and at need lay down their lives in remote tropic jungles to bring the light of civilization into the world’s dark places.

Roosevelt Memorial Day Address, *supra* note 13.

in the fullest and most circumstantial manner all the facts, nothing being concealed and no man being for any reason favored or shielded.”²²

President Roosevelt’s second imperative was to fairly punish those guilty of cruelty and barbarity. The earlier communication spoke of the need “to uncover every such case which may have occurred and bring the offenders to justice,” with “no man being . . . shielded.”²³ The President, it was said, “intends . . . that men guilty [of any cruelty or brutality] are punished.”²⁴

President Roosevelt’s final imperative was to take strong action to minimize or prevent future acts of cruelty and barbarity. The earlier communication stated the President “intends to see that the most rigorous care is exercised to . . . prevent any cruelty or brutality”²⁵

Our experience using torture in the Philippine-American War and our modern record are very similar. One cannot read the historic accounts without identifying the speakers then with modern counterparts. One cannot consider their failings and not see that we are failing in the same ways. Seeing how the nation met President Roosevelt’s three imperatives—full disclosure, fair punishment, and strong prevention—after the Philippine-American War may help us meet the same three imperatives today with respect to our recent history of torture.

The discussion corresponds to President Roosevelt’s three imperatives. First, we review the history of water torture during the Philippine-American War and whether there was full disclosure of that history.²⁶ Second, we examine the legal consequences of that history and whether those who violated the rules were fairly punished.²⁷ Third, we ask whether strong measures were taken to prevent a recurrence of water torture.²⁸ The conclusion compares our ancestors’ record in fulfilling President Roosevelt’s imperatives after the Philippine-American War and our record after our modern use of water torture.²⁹

II. FULL DISCLOSURE: WATER TORTURE IN THE PHILIPPINE-AMERICAN WAR

The American battleship U.S.S. *Maine* blew up while at anchor in Havana Harbor on the night of February 15, 1898, killing two hundred and sixty of her crew of four hundred. While the cause of the explosion was never definitively ascertained, popular sentiment at the time blamed Spain, which then occupied Cuba and was involved in a three-year struggle with Cuban independence fighters.³⁰ Less than two

22. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1328 (Washington, vol. 2. 1902) (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee).

23. *Id.* at XX.

24. *Id.* at XX.

25. *Id.*

26. *See infra* Part II.

27. *See infra* Part III.

28. *See infra* Part IV.

29. *See infra* Part V.

30. There is a long-standing consensus among historians that a coal-bunker fire is the likely cause of the U.S.S. *Maine* explosion. H.G. Rickover, *HOW THE BATTLESHIP MAINE WAS DESTROYED* 125 (Annapolis, Md., Naval Institute Press, 1995 ed.) (reporting conclusion of study by naval historians and engineers that the U.S.S. *Maine* explosion was internal, “without a doubt.”).

months later, President William McKinley requested Congressional authorization to intervene in Cuba. Congress passed a joint resolution that recognized Cuban independence, called upon Spain to withdraw, and authorized the use of military force to expel Spain from Cuba. Within days, Spain declared war on the United States.³¹

The United States' war with Spain came against the backdrop of an existing armed struggle by the people of the Philippines against their occupation by Spain. Starting in 1896 the Filipinos fought to end Spanish rule. By 1897 they gained some military victories and Emilio Aguinaldo emerged as the leader of the movement.³² But toward the end of 1897 the military struggle descended into stalemate, and the resulting negotiations with the Spanish led to the exile of Aguinaldo to Hong Kong.³³ After the declaration of war between Spain and the United States, but before the start of combat operations in the Philippines, Aguinaldo met with American representatives to discuss his return to the Philippines and his assistance in the coming armed conflict with Spain.³⁴

Although the reasons for the Spanish-American war revolved around Cuba, the initial battle of the war took place over 9,000 miles away in Manila Bay. There, on May 1, 1898, a U.S. Navy squadron under Commodore George Dewey destroyed the Spanish fleet defending its occupation of the Philippines. Within three weeks Aguinaldo returned to the Philippines on an American ship.³⁵ Following Commodore Dewey's defeat of the Spanish fleet, the American Army and the Filipino nationalists cooperated in containing the Spanish garrison in Manila.

31. U.S. Department of State, Office of the Historian, MILESTONES: 1866-1898 *The Spanish-American War, 1898*, <https://history.state.gov/milestones/1866-1898/spanish-american-war> (last visited November 18, 2016).

32. Aguinaldo prevailed in the factional struggle within the Filipino forces over Andres Bonifacio, who had founded the initial Filipino revolutionary organization, the Katipunan, in 1892. Bonifacio was executed on May 10, 1897, for sedition and treason against the Aguinaldo movement.

33. JONES, *supra* note 8, at 44.

34. Admiral George Dewey and General E. S. Otis denied any agreement had been entered into with Aguinaldo. *Lodge Committee Hearings*, *supra* note 6, at 815 (General Otis that he never conveyed to Aguinaldo "that the United States would not assume absolute sovereignty and governmental control over the Philippine Islands . . ."), 2928 (Admiral Dewey "never dreamed that they wanted independence."). Anti-imperialist Massachusetts Senator George Frisbie Hoar stated the contrary position:

Twice our commanding generals, by their own confession, assured these people of their independence. Clearly and beyond all cavil we formed an alliance with them . . . We were told by them again and again and again that they were fighting for independence. Their purpose was as well known to our generals, to the war department, and to the president, as the fact that they were in arms . . . If we crush that republic, despoil that people of their freedom and independence, and subject them to our rule, it will be a story of shame and dishonor.

George F. Hoar, *The Lust of Empire: Speech of Hon. George F. Hoar of Massachusetts in the United States Senate 41 (April 17, 1900) [hereinafter Hoar, The Lust of Empire]*. Some historians conclude that the United States made commitments to the Filipinos. JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY*, 354 (2012); *see also* JONES, *supra* note 8, at 45.

35. Aguinaldo returned to the Philippines on May 19, 1898. Mark Twain, a forceful critic of imperialist policy, described it: "[W]e, our own selves, had brought back out of exile their leader, their hero, their hope, their Washington – Aguinaldo; brought him in a warship, in high honor, under the sacred shelter and hospitality of the flag; brought him back and restored him to his people, and got their moving and eloquent gratitude for it." Mark Twain, *To the Person Sitting in Darkness*, N. AM. REV. 172 (Feb. 1901).

On June 12, 1898, the Filipinos declared their independence from Spain, asserting that “the people of these Philippine Islands . . . are and have the right to be free and independent”³⁶ The cordial relationship of the Filipinos and the American government at the time of their Declaration of Independence was clearly reflected in the writing:

And having as witness to the rectitude of our intentions the Supreme Judge of the Universe, and under the protection of the Powerful and Humanitarian Nation, the United States of America, we do hereby proclaim and declare solemnly in the name and by authority of the people of these Philippine Islands, That they are and have the right to be free and independent; that they have ceased to have any allegiance to the Crown of Spain; and that all political ties between them are and should be completely severed and annulled; and that, like other free and independent states, they enjoy the full power to make War and Peace, . . . and do all other acts and things which an Independent State has a right to do, And imbued with firm confidence in Divine Providence, we hereby mutually bind ourselves to support this Declaration with our lives, our fortunes, and with our most sacred possession, our Honor.³⁷

The Filipino Declaration of Independence concluded with adoption of their flag, and a statement of the symbolism of the various elements of the banner:

[T]he colors of Blue, Red, and White, commemorating the flag of the United States of North America, as a manifestation of our profound gratitude towards this Great Nation for its disinterested protection which it lent us and continues lending us.³⁸

The Filipinos were about to learn the contours of the “disinterested protection” they could expect from the United States.

Following American victories over Spanish forces in Cuba,³⁹ the Spanish-American War ended with the Treaty of Paris of December, 1898. The United States, playing what renowned author Mark Twain described as “the usual and regular *American game*,” gave Cuba its freedom:

The Master, contemplating Cuba, said: “Here is an oppressed and friendless little nation which is willing to fight to be free; we go partners, and put up the strength of seventy million sympathizers and the resources of the United States.” . . . There, in Cuba, he was following our great traditions in a way which made us very proud of him Moved by a high inspiration, he threw out those stirring words which proclaimed that forcible annexation would be “criminal aggression”⁴⁰

But when it came to the Philippines, the United States charted a different path. As part of the resolution of their conflicts, we caused Spain to sell its position in the Philippines to us for \$20 million. Ten days after the Treaty of Paris was signed, President McKinley issued a statement, known as the “Benevolent Assimilation

36. ACT OF PROCLAMATION OF INDEPENDENCE OF THE FILIPINO PEOPLE (ACTA DE LA PROCLAMACIÓN DE LA INDEPENDENCIA DEL PUEBLO FILIPINO) (Phil. June 12, 1898).

37. *Id.*

38. *Id.*

39. U.S. land forces came ashore at Guantanamo Bay and near Santiago in June and defeated the Spanish army. The U.S. Navy destroyed the Spanish naval squadron off Santiago on July 3, 1898.

40. Twain, *supra* note 35, at 169 (emphasis in original).

Proclamation.”⁴¹ In it, the President cited the Treaty of Paris and the American military victories over Spain as providing that “the future control, disposition, and government of the Philippine Islands are ceded to the United States.”⁴² He announced a doctrine of benevolent assimilation:

[I]t should be the earnest wish and paramount aim of the military administration to win the confidence, respect, and affection of the inhabitants of the Philippines by assuring them in every possible way that full measure of individual rights and liberties which is the heritage of free peoples, and by proving to them that the mission of the United States is one of

BENEVOLENT ASSIMILATION

[S]ubstituting the mild sway of justice and right for arbitrary rule.⁴³

President McKinley cast the American presence in the Philippines as “succeeding to the sovereignty of Spain” through the purchase of its interest. Republican anti-imperialist Senator George Frisbie Hoar of Massachusetts framed the opposition position:

I affirm that you cannot get by conquest, and you cannot get by purchase . . . sovereignty over a people, or title to a territory, of which the power that undertakes to sell it, or the power from whom you undertake to wrest it, has not the actual possession and domination.⁴⁴

Mark Twain was highly critical of President McKinley’s claim to have succeeded Spain’s position in the Philippines:

We and the patriots having captured Manila, Spain’s ownership of the Archipelago and her sovereignty over it were at an end – obliterated – annihilated – not a rag or shred of either remaining behind. It was then that we conceived the divinely humorous idea of *buying* both of these spectres from Spain!⁴⁵

In denying the Filipinos their independence the United States chose to play what Twain described as “the European game.”

For, presently, came the Philippine temptation. It was strong; it was too strong, and he made that bad mistake: he played the *European* game . . . For it was the very place and time to play the American game again. And at no cost. Rich winnings to be gathered in, too; rich and permanent; indestructible; a fortune transmissible forever to the children of the flag. Not land, not money, not dominion – no, something worth many times more than that dross: our share, the spectacle of a nation of long harassed and persecuted slaves set free through our influence; our posterity’s share, the golden memory of that fair deed.⁴⁶

Had we played the American game, our actions and the future of the Philippines

41. President William McKinley, Benevolent Assimilation Proclamation (Dec. 21, 1898), <http://www.msc.edu.ph/centennial/benevolent.html>.

42. *Id.*

43. *Id.*

44. Hoar, *The Lust of Empire*, *supra* note 34, at 23; Senator George Frisbie Hoar, *Subjugation of the Philippines Iniquitous* (May 22, 1902) [hereinafter *Subjugation*] (“You declared . . . that you had a right to buy sovereignty with money, or to treat it as the spoils of war or the booty of battle.”).

45. Twain, *supra* note 35, at 172-73 (emphasis in original).

46. *Id.* at 169-70 (emphasis in original).

would have been quite different:

The game was in our hands. If it had been played according to the American rules, Dewey would have sailed away from Manila as soon as he had destroyed the Spanish fleet – after putting up a sign on shore guaranteeing foreign property and life against damage by the Filipinos, and warning the Power that interference with the emancipated patriots would be regarded as an act unfriendly to the United States . . . Dewey could have gone about his affairs elsewhere, and left the competent Filipino army to starve out the little Spanish garrison and send it home, and the Filipino citizens to set up the form of government they might prefer . . .⁴⁷

By giving Cuba its freedom and independence and denying the same to the Philippines, American anti-imperialists claimed the United States compromised its standing with oppressed people across the globe.⁴⁸ Twain cast the situation from the standpoint of the oppressed:

There is something curious about this – curious and unaccountable. There must be two Americas: one that sets the captive free, and one that takes a once-captive’s new freedom away from him, and picks a quarrel with him with nothing to found it on; then kills him to get his land.⁴⁹

And so America went down the path of conquest in the Philippines. Tensions rose between the Filipino nationalists and the American soldiers of occupation as it became clear that the Americans were not going to withdraw from the Philippines in deference to the Filipino’s desire for independence. Admiral Dewey, in a wonderfully naïve moment, explained when he discovered that the interests of the Filipinos and the Americans diverged:

Speaking of Aguinaldo’s loyalty, [Admiral Dewey] said that he had become suspicious of that leader before the receipt of his proclamation of July 15. He said: “I began to suspect that he was not loyal to us when he demurred to moving out of Cavite when our troops arrived.”

“You mean that they were thinking more of their own independence than of us?”

“Yes.”⁵⁰

Of the missed opportunity, Senator Hoar declared in 1902:

Your practical statesmanship has succeeded in converting a people who three years

47. *Id.* at 170.

48. It was seen by the anti-imperialists that America had abandoned the laudable goals affirmed in Cuba. Carl Schurz, *Thoughts on American Imperialism*, *THE CENTURY MAGAZINE*, Sept. 1898 at 781, 784 (“Will they not with a good show of reason argue that a nation capable of turning a war that was solemnly proclaimed as a war of emancipation and humanity into a land-grabbing operation, will be capable of anything in the line of deceit and rapacity”); BARBARA W. TUCHMAN, *THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR: 1890-1914*, at 159 (1966) (“Democrats and Populists especially had felt the war in Cuba to be in the cause of freedom. Now, through some sorcery of fate, the war had turned into a matter of imposing sovereignty over an unwilling people by right of conquest. American had become the new Spain.”).

49. Twain, *supra* note 35, at 170.

50. *Aguinaldo All For Gain*, N.Y. *TIMES*, June 27, 1902; JONES, *supra* note 8, at 87 (“Dewey dubiously testified . . . that he was even unaware that Aguinaldo desired independence when he brought him back to the islands.”).

ago were ready to kiss the hem of the garment of the American and to welcome him as a liberator, who thronged after your men when they landed on those islands with benediction and gratitude, into sullen and irreconcilable enemies, possessed of a hatred which centuries can not eradicate.⁵¹

As Twain characterized it:

With our Treaty ratified, Manila subdued, and our Ghosts secured, we had no further use for Aguinaldo and the owners of the Archipelago. We forced a war, and we have been hunting America's guest and ally through the woods ever since.⁵²

The Senate ratified the Treaty of Paris by a margin of one vote on February 6, 1899, ending the Spanish-American War.⁵³ Two days earlier the Philippine-American War started, when fighting broke out between the American army of occupation and Filipino nationalists led by Aguinaldo.⁵⁴ Our war on the Philippines lasted from February of 1899 to July of 1902.⁵⁵ It was prosecuted first by President William McKinley and, after McKinley's assassination in September of 1901, by President Theodore Roosevelt.

Notwithstanding assurances to the contrary by the administration⁵⁶ and the Army,⁵⁷ the Philippine-American War was often a brutal affair.⁵⁸ Although

51. Subjugation, *supra* note 44; *Philippine Problem before the Senate: Senator Hoar Talks for an Investigating Committee*, N.Y. TIMES, Jan. 15, 1902 [hereinafter *Senator Hoar Talks*] ("If we had dealt with this people as we dealt with Cuba we should have had today a civilized, happy peaceful republic sending their youths to our schools studying our laws, imitating our examples, animated by a love and affection and a gratitude such as no one people on earth ever yet felt for another.").

52. Mark Twain, *To the Person Sitting in Darkness*, *supra* note 35, at 161.

53. The vote on ratification was 57 to 27, one more than the two-thirds required to ratify the treaty. JONES, *supra* note 8, at 108.

54. TUCHMAN, *supra* note 48, at 163 ("Although by now it was half expected, Aguinaldo and his forces learned of the settlement in bitterness and anguish, many of them hardly able to believe that their liberators and allies had turned into a new set of conquerors.").

55. U.S. DEPARTMENT OF STATE, OFFICE OF THE HISTORIAN, *Milestones: 1899-1913; The Philippine-American War, 1899-1902*, <https://history.state.gov/milestones/1899-1913/war>.

56. The administration advanced a narrative of compassion and restraint. Speaking on behalf of the administration, Governor Taft opined:

I desire to say that it is my deliberate judgment that there never was a war conducted, whether against inferior races or not, in which there were more compassion and more restraint and more generosity, assuming that there was a war at all, than there have been in the Philippine Islands.

Lodge Comm. Hearings, *supra* note 6, at 77-78; *Gov. Taft Talks before Philippines Committee*, N.Y. TIMES, February 1, 1902, at 3.

57. General Arthur MacArthur, Jr. advanced a similar narrative on behalf of the Army:

I doubt if any war – either international or civil, any war on earth – has been conducted with as much humanity, with as much careful consideration, with as much self-restraint, in view of the character of our adversary, as have been the American operations in the Philippine Archipelago.

Lodge Comm. Hearings, *supra* note 6, at 870. Major General E. S. Otis, who served during part of the war as the Military Governor of the Philippines, testified: "We were laughed at by the Spaniards and by Europeans for the humanity we exercised." *Id.* at 739.

58. Senator George Frisbie Hoar observed that "they have carried on your warfare with a mixture of American ingenuity and Castilian cruelty." Subjugation, *supra* note 44; see also WITT, *supra* note 34, at 355 ("The U.S. Army responded [to Filipino desires for independence] with a retaliatory campaign of startling violence and destruction."). The U.S. Department of State estimates the casualties of the Philippine-American War at "over 4,200 American and over 20,000 Filipino combatants," and estimates that "over 200,000 Filipino civilians died from violence, famine, and disease." U.S. DEPARTMENT OF

President McKinley promised that the Filipinos who resisted American rule would “be brought within the lawful rule we have assumed, with firmness if need be, but without severity, so far as possible,”⁵⁹ the actions of the American Army were often severe.⁶⁰ As part of what one Army War College writer asserts was “the most successful counterinsurgency campaign in United States history,”⁶¹ American soldiers engaged in the burning of villages,⁶² the establishment of reconcentration camps to depopulate areas of the countryside,⁶³ reprisals against innocent civilian

STATE, OFFICE OF THE HISTORIAN, *Milestones: 1899-1913, The Philippine-American War, 1899-1902*, <https://history.state.gov/milestones/1899-1913/war>.

59. Benevolent Assimilation Proclamation, *supra* note 41.

60. MELVIN L. SEVERY, GILLETTE’S SOCIAL REDEMPTION 229-30 (1907) (“The inhumanity which has characterized the American occupation of the Philippines can no longer be denied. It must now be either defended with bravado or confessed with shame.”).

61. MARK G. OSWALD, DEPARTMENT OF THE ARMY, THE “HOWLING WILDERNESS” COURTMARTIAL OF 1902, at 1 (U.S. Army War C. 2001) (“[T]he consensus among scholars is that the military operations of 1899-1902 constitute the most successful counterinsurgency campaign in United States history.”). If the universe of counterinsurgency campaigns in which the United States has been involved includes the Philippines (1899-1902), Nicaragua (1911-1925), Haiti (1915-1934), Viet Nam (1961-1975), Afghanistan (2001-present), and Iraq (2003-present), it might be observed that the competition to be the “most successful counterinsurgency campaign in United States history” is hardly robust.

62. The Lodge Committee heard numerous references to the burning of towns. *Lodge Committee Hearings*, *supra* note 6, at 32, 430, 529, 558, 572, 883, 884, 892, 955, 958, 959, 968, 1483, 1531, 1533, 1540, 1542-44, 1548, 1589, 1596, 1603, 1614, 1655, 1661, 1669, 1679, 1716, 1729, 1731, 1734, 1735, 1784, 1832, 1973-75, 2064, 2066, 2239, 2256, 2328, 2333, 2434, 2444, 2544, 2551, 2552, 2557, 2561, 2572, 2577-79, 2584, 2586, 2625, 2753, 2762, 2763, 2767, 2782-84, 2786, 2787, 2854, 2857, 2858, 2864, 2869, 2886-88, 2893, 2894, 2900, 2901, 2904-06. There was testimony that the burning of towns was commonplace (*id.* at 1975), and counterproductive (*id.* at 881) (Report of Tayabas Province Governor to the Civil Governor of the Philippine Islands, December 16, 1901). The Committee also heard testimony that, like torture to obtain information, the indiscriminate burning of villages was a violation of the express rules of war. *Id.* at 2869. A soldier writing from the Philippines to his family in Marshfield, Wisconsin put the burning of Filipino homes and villages in context. *Given the Water Cure: How Filipino Insurgents Get the “Third Degree,” From a Regular Soldier, Former Wisconsin Volunteer Writes to His Home Paper of His Experiences in the Philippine Islands*, THE SAINT PAUL GLOBE, Oct. 30, 1900, at 3 (reprinted from the Marshfield Wis. News) (“I see in some of the American papers they are calling down the British for burning down the Boer farm houses, etc. Why don’t they look at home first? Over here that is a common occurrence.”).

63. Seeking to quell the Cuban War for Independence of 1895, Spanish General Valeriano Wyler adopted a policy of seeking to gather the rural population of Cuba into “reconcentration camps.” This was done to deny the revolution the support of the rural population, of whom it was said “the entire people were at heart insurrectionists, and the very grass under the feet of the Spaniards was insurgent.” *The Butcher of Cuba: Weyler in His Feroocious and Frivolous Moods – Origin of Reconcentrado Plan*, SALT LAKE TRIBUNE, April 5, 1898 (quoting a Spanish sympathizer in Havana). The suffering of the Cubans who were gathered into the camps was intense, and the American reaction was extremely critical. The American Army in the Philippines established reconcentration camps for the same purpose, to deny the Filipino forces the support of the rural communities. Although there are indications that the Americans were better at meeting the physical needs of the Filipinos confined to the reconcentration camps, it is still the case that the Filipinos in the American camps were confined by a “dead line” and guards were ordered to shoot individuals who crossed the line. *Lodge Committee Hearings*, *supra* note 6, at 2846-53 (general testimony of Colonel Arthur L. Wagner, Assistant Adjutant-General, U.S. Army), 2849 (dead line; “orders were given under no circumstances to shoot any decrepit person, child, or woman and to avoid shooting a person under any circumstances if the necessary end could be obtained without it.”). In 1903 the Commanding General of the Army, General Nelson A. Miles opined that the reconcentration camps were in direct violation of the law. *Gen. Miles’s Report on Philippine Army: His Criticism of Various Conditions Made Public: He Treats of Instances of Cruelty Reported to Him – Bureau Chiefs at Washington Dissent*

hostages,⁶⁴ and torture.⁶⁵

In what one writer describes as “a systematic and widespread campaign of torture unlike anything in more than a century of American history,” the most common form of torture was the water cure.⁶⁶ As described by a lieutenant who witnessed the process, the water torture technique used by American soldiers in the Philippine-American War was brutally simple:

A man is thrown down on his back and three or four men sit or stand on his arms and legs and hold him down; and either a gun barrel or a rifle barrel or a carbine barrel or a stick as big as a belaying pin, – that is, with an inch circumference, -- is simply thrust into his jaws and his jaws are thrust back, and, if possible, a wooden log or stone is put under his head or neck, so he can be held more firmly. In the case of very old men I have seen their teeth fall out, – I mean when it was done a little roughly. He is simply held down and then water is poured onto his face down his throat and nose from a jar; and that is kept up until the man gives some sign or becomes unconscious. And, when he becomes unconscious, he is simply rolled aside and he is allowed to come to. In almost every case the men have been a little roughly handled. They were rolled aside rudely, so that water was expelled. A man suffers tremendously, there is no doubt about it. His sufferings must be that of a man who is drowning, but cannot drown.⁶⁷

There were variations in technique. Instances are reported where a syringe was used⁶⁸ and where the water was ingested through both the mouth and the nose.⁶⁹ It is reported that water was poured from a canteen,⁷⁰ a tomato can,⁷¹ a pail,⁷² or a jar.⁷³ It is also reported that U.S. soldiers inflicted water torture on Filipinos by taking them into a body of water and holding them under the surface.⁷⁴ There are reports

From His Opinions, N.Y. TIMES, April 28, 1903 (“*Gen. Miles’s Report*”). The American camps in the Philippines, and the contemporary British camps in South Africa during the Boer War, were the subject of an observation by Mark Twain: “And, no doubt, it was Funston’s example that made us (and England) copy Weyler’s reconcentrado horror after the pair of us, with our Sunday-school smirk on, and our goody-goody noses upturned toward heaven, had been calling him a “fiend.” Mark Twain, *A Defence of General Funston*, NORTH AM. REV., May, 1902, at 624.

64. CHRISTOPHER J. EINOLF, *AMERICA IN THE PHILIPPINES, 1899-1902: THE FIRST TORTURE SCANDAL* 82 (2014) (Brigadier General J. Franklin Bell “ordered his subordinates to take civilian leaders hostage and execute them in retaliation if the insurgents attacked.”).

65. JONES, *supra* note 8, at 209 (“Each blow struck by the resistance provoked swift retribution from U.S. troops including the burning of houses or entire villages, torture of witnesses or suspects, and in some cases, summary execution of suspected guerrillas.”).

66. WITT, *supra* note 34, at 355.

67. *Lodge Committee Hearings*, *supra* note 6, at 1767-68 (testimony of Lieutenant Grover Flint).

68. *Id.* at 1539-40 (testimony of William Lewis Smith); Welch, *supra* note 11, at 235.

69. *Lodge Committee Hearings*, *supra* note 6, at 1539-40 (testimony of William Lewis Smith).

70. *Id.* at 2327, 2282, 2885 (testimony of George G. Boardman and Sergeant Mark H. Evans); Welch, *supra* note 11, at 235.

71. *Lodge Committee Hearings*, *supra* note 6, at 2061-62 (testimony of Corporal D. J. Evans).

72. *Id.* at 2249 (testimony of Sergeant Isadore H. Dube).

73. *Id.* at 1767-68 (testimony of Lieutenant Grover Flint).

74. *Id.* at 2883-84 (testimony of Mark H. Evans).

that salt water⁷⁵ or otherwise dirty water was used,⁷⁶ or that salt was added to the water,⁷⁷ to increase the effectiveness of the torture. Sergeant William J. Gibbs, a piano tuner by occupation, testified that dirty water or seawater was preferable “[s]imply to inflict a more severe punishment on them.”⁷⁸ Other reports are that the Filipino victim was whipped while undergoing the water torture,⁷⁹ or shortly before or after the torture.⁸⁰ Some victims were punched in the stomach to expel the water.⁸¹ Although the victims of water torture were typically Filipino men of military age, there are reports of American soldiers subjecting old men and women to water torture.⁸²

It is perhaps inevitable that in the century since American soldiers used tomato cans to administer the water cure to Filipinos, clever torturers refined their technique. Modern water boarding differs from the water cure used in the Philippines in several respects.⁸³ First, in the modern technique, the person being tortured is inclined with

75. *Id.* at 2305 (testimony of Sergeant William Gibbs); Welch, *supra* note 11, at 235; WITT, *supra* note 34, at 356. Interestingly, at one time after the attacks of September 11, 2001, CIA protocols required the use of salt water. Memorandum from the Office of the Principal Deputy Ass’t Att’y Gen. Steven G. Bradbury to John Rizzo, Senior Deputy Gen. Counsel of the Cent. Intel. Agency, Re: App. of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Inter. of a High Value al Qaeda Detainee 13 (May 10, 2005) (“[B]ased on advice of medical personnel, the CIA requires that saline solution be used instead of plain water to reduce the possibility of hyponatremia (i.e., reduced concentration of sodium in the blood) if the detainee drinks the water.”).

76. *Lodge Committee Hearings*, *supra* note 6, at 2303-05 (testimony of Sergeant William J. Gibbs).

77. *Id.* at 1540 (testimony of William Lewis Smith).

78. *Id.* at 2305, 2310 (testimony of Sergeant William J. Gibbs).

79. *Id.* at 2061 (testimony of Corporal D. J. Evans).

80. *Id.* at 2237 (testimony of Sergeant Richard V. Hughes).

81. *Id.* at 2061-62, 2065 (testimony of Corporal D. J. Evans) (“Then one man, an American soldier, who was over six feet tall, and who was very strong, too, struck this native in the pit of the stomach as hard as he could strike him, just as rapidly as he could. It seemed as if he didn’t get tired of striking him He struck him right in the pit of the stomach and it made the native very sick I think it would be safe to say that he struck him at least forty times right in the pit of the stomach.”); *see also* Welch, *supra* note 11, at 235 (“Diversity was chiefly exhibited . . . in the means employed to expel the water and shock the victim into a state of consciousness and confession.”).

82. *Given the Water Cure*, *supra* note 62; EINOLF, *supra* note 64, at 72.

83. Modern American practice, described by the Department of Justice in 2002, is clinically precise: In [the waterboard] procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual’s blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of “suffocation and incipient panic,” i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout [T]his procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning

the lungs higher than the mouth and nose to minimize the amount of water going into the lungs. Second, the modern use of a cloth over the mouth and nose limits the amount of water ingested. Third, the modern technique apparently admits the possibility of greatly increased repetitions. In the testimony before the Lodge Committee there were only a few instances in which individual Filipinos were subjected to water torture more than once, and only one instance in which a Filipino was subjected to water torture more than “several times.”⁸⁴ In contrast, the CIA reportedly subjected one of its prisoners to water torture at least 183 times.⁸⁵

As the war continued, disturbing reports reached the United States concerning the behavior of the troops towards the Filipino population.⁸⁶ Increasingly, such reports suggested President McKinley’s promise of a firm but not severe campaign was not being fulfilled.⁸⁷ Senator Hoar called for a special committee to investigate the conduct of the war.⁸⁸ Unable to forestall an inquiry altogether, the administration and its allies in the Senate arranged to have the inquiry conducted by the standing Committee on the Philippines, chaired by Republican Senator Henry Cabot Lodge of Massachusetts, an ardent imperialist.⁸⁹

While the Lodge Committee hearings produced the most extensive record of the

Memorandum from Ass’t Att’y Gen. Jay S. Bybee, for John Rizzo, Acting Ge. Counsel of the Cent. Intel. Agency, Interrogation of al Qaeda Operative , 3-4 (Aug. 1, 2002); *see also* Brian Ross and Richard Esposito, *CIA’s Harsh Interrogation Techniques Described: Sources Say Agency’s Tactics Lead to Questionable Confessions, Sometimes to Death*, ABC NEWS, Nov. 18, 2005, <http://www.mindfully.org/Reform/2005/CIA-Torture-Death18nov05.htm> (Aug. 26, 2016); Daniel Kanstroom, *On “Waterboarding”: Legal Interpretation and the Continuing Struggle for Human Rights*, 28 B.C. THIRD WORLD L.J. 269, 270 (2008).

84. *Lodge Committee Hearings*, *supra* note 6, at 1539-40 (twice), 2236-37 (twice), and 2897 (several times). It was admitted by the officer who supervised the water torture that Father Augustine was subjected to the water cure three times before he died. Herbert Welsh, ed., *Remarkable Scene in the Senate*, CITY AND STATE (Feb. 12, 1903) 134 (“From the Springfield (Mass.) ‘Republican’”) [hereinafter *Remarkable Scene*].

85. *Select Committee Report*, *supra* note 4, at 85.

86. *More Talk of Filipinos*, N.Y. TIMES, Feb. 13, 1902 [hereinafter *More Talk*]; WITT, *supra* note 34, at 359; Kramer, *supra* note 7. Not all of the reports were true. In February of 1902 a report circulated that American soldiers under General Funston subjected 160 Filipinos to water torture, 134 of whom, it was claimed, died. General Funston branded the claim “an atrocious lie, without the slightest foundation in fact.” *Lodge Committee Hearings*, *supra* note 6, at 949, 951.

87. JONES, *supra* note 8, at 115 (“McKinley had ordered the ‘benevolent assimilation’ of the Filipinos, but on the ground U.S. field commanders modeled their tactics after the Army’s unsparing campaign against the Indian tribes of the American West.”).

88. *Senator Hoar Talks*, *supra* note 51.

89. *Philippine Problem before the Senate; Senator Hoar Talks for an Investigating Committee*, N.Y. TIMES, January 15, 1902, at page 3; *see Senator Hoar Talks*, *supra* note 51; *see also* Oswald, *supra* note 61, at 10; JONES, *supra* note 8, at 270-71. The Committee consisted of thirteen senators, eight Republicans and five Democrats. The division of the Committee on matters of Philippine policy was between “imperialists” and “anti-imperialists,” not strictly along party lines. While all of the seven imperialist members of the Committee were Republicans, one Republican broke ranks and sided with the five Democrats on the anti-imperialist side. The imperialist members of the Committee were Senators Henry Cabot Lodge of Massachusetts, the chair, Albert J. Beveridge of Indiana, Redfield Proctor of Vermont, William Boyd Allison of Iowa, Charles Henry Dietrich of Nebraska, Louis Emory McComas of Maryland, and Julius Caesar Burrows of Michigan. The anti-imperialist members of the Committee were Democratic Senators Edward Ward Carmack of Tennessee, Charles Allen Culberson of Texas, Fred T. Dubois of Idaho, Thomas M. Patterson of Indiana, and Joseph Lafayette Rawlins of Utah, and Republican Senator Eugene Hale of Maine.

use of water torture by the Army in the Philippine-American War, it is helpful in evaluating that body of information to remember what the Lodge Committee hearings were, and what they were not.

The Lodge Committee hearings were not focused solely on water torture by American soldiers, or even solely on the conduct of the war in the Philippines. The Committee considered a large number of topics unrelated to the war.⁹⁰

The Lodge Committee hearings were not comprehensive. No attempt was made to call witnesses from every sector of the Philippines, or from every phase of the conflict. The imperialist Republican majority blocked efforts to call Aguinaldo and other witnesses, and blocked efforts to go to the Philippines to hear testimony.⁹¹ No Filipinos were called; no Army witnesses were summoned from the Philippines. Nor were the hearings continuous. In the 148 days between the initial day of hearings, January 31, 1902, and the final day, June 28, 1902, the Committee heard testimony on only sixty days.⁹²

Finally, the Lodge Committee hearings were the product of a Senate, the deep divisions of which mirrored the divisions of the nation over the situation in the Philippines.⁹³ As a result of the animosity between the factions on the Committee, the range of testimony available to the Committee was constrained.⁹⁴ The imperialists on the Committee aggressively used evidentiary objections to prevent the Committee from hearing information on water torture and other topics embarrassing to the administration and the Army.⁹⁵ Senator Lodge and the imperialist majority resisted calls to reconvene the hearings to supplement the record

90. *Lodge Committee Hearings*, *supra* note 6, at 23-26 (roads and transportation), 46-49 (education), 142 (industrial taxation), and 147 (leprosy).

91. *Will Not Call Maj. Gardener: Senate Committee on the Philippines Decides by a Party Vote – Gen. MacArthur’s Testimony*, N.Y. TIMES, May 1, 1902 [hereinafter *Will Not Call Maj. Gardener*]. The anti-imperialist minority was not permitted to call President Aguinaldo as a witness. *Lodge Committee Hearings*, *supra* note 6, at 1950.

92. January 31; February 1, 3-8, 10, 14, 15, 18-20, 25-28; March 3-6, 8, 11, 13, 17, 19, 20; April 7, 10-12, 15, 17, 21, 29, 30; May 1-3, 5, 6, 8-10, 13, 15, 19-23, 26, 27, 29, 31; and June 12, 26-28. See generally *Lodge Committee Hearings*, *supra* note 6.

93. JONES, *supra* note 8, at 90 (“[A]cross America the winds of a bitter and divisive debate had begun to blow.”); see *id.* at 270.

94. Examples of the acrimonious tone abound in the press reports of the committee proceedings. *More Talk*, *supra* note 86 (“a sharp clash”); *Gen. Hughes’s Retort*, N.Y. TIMES, Mar. 6, 1902 (“some degree of irritability,” and “warmth of feeling”); *Sharp Responses Made In Philippine Inquiry*, N.Y. TIMES, Mar. 6, 1902 (“sharp colloquy,” and “unmistakable evidence of irritation”); *Republicans Change Tactics In Senate*, N.Y. TIMES, May 4, 1902 (“The debate was . . . characterized by a personality and acrimony hitherto unknown in the discussion.”); *Philippine Question Up In The Senate*, N.Y. TIMES, May 7, 1902 (“fiery discussion,” and “spirited colloquy”) [hereinafter *Philippine Question Up In The Senate*]; *The Philippine Inquiry*, N.Y. TIMES, May 22, 1902 (“sharply and angrily”).

95. The Committee’s imperialist majority repeatedly used hearsay and related concepts to attempt to block information embarrassing to the administration and the Army. *Lodge Committee Hearings*, *supra* note 6, at 589-90, 1407, 1409-20, 1531, 1538, 1973-74, 2244, 2304, 2896-97. The anti-imperialist minority rarely invoked the hearsay rules to attempt to exclude testimony. *Id.* at 1950. The Committee’s imperialist majority also repeatedly asserted a rule that it was improper to ask a military witness a question that involved a criticism of another military figure. *Id.* at 1409-11, 14. The anti-imperialist minority resisted the purported rule. *Id.* at 1411, 13 (“I do not want to make any concession that we are not entitled to this because the answer might reflect upon an officer. We are entitled to what is competent, and what is competent should be construed with great latitude . . .”) (Statement of Senator Rawlins).

as additional facts became known and additional witnesses became available. The Boston Herald editorialized:

Senator Lodge has turned down the petition of several hundred leading citizens, representing especially the universities of the country, asking that the Senate Committee on the Philippines reopen the inquiry suddenly closed last summer, when many witnesses believed to be able to give important evidence had not been heard. . . . Mr. Lodge is unwilling to have any more truth revealed, and the action of the committee supported him by a party division. The inquiry that was had was fruitful – too fruitful to suit Mr. Lodge. He hampered it constantly when it was in progress, and he stopped it without calling witnesses he had promised to call, who would have testified to the murder of the Catholic priest, which has since been acknowledged by the War Department. There is good reason to believe that other and equally horrible crimes await revelation. Senator Lodge has no mind to discover them.⁹⁶

Even given the flaws of the Lodge Committee review, however, it generated some valuable information about the use of water torture by American soldiers. Among the Lodge Committee's accomplishments was that it assembled incontrovertible evidence that officers, enlisted men, and associates of the American Army engaged in water torture during the Philippine-American War. The Lodge Committee heard from some fifteen witnesses with first-hand knowledge of water torture.⁹⁷

However, the Lodge Committee failed to assemble a record of whether water torture was widely used, and of whether water torture was uniformly employed in geographic and temporal terms.⁹⁸ The testimony contained a wide range of individual, largely unsupported opinions as to how widespread the use of water torture was during the Philippine-American War.

Two generals testified that water torture was exceedingly rare during the Philippine-American War. General Frederick Funston testified that he had no personal knowledge of the “water cure . . . or any other form of torture” being used, that he “never heard of its having been administered to a native by a white man,” and that it was “very rarely, if ever, administered by American soldiers” and only “occasionally” by their indigenous Macabebe Scouts.⁹⁹ General Robert P. Hughes heard that it was tried in his command on one occasion and then abandoned.¹⁰⁰

96. Ellwood Bergey, *Mrs. Richter and the President*, CITY AND STATE, Mar. 5, 1903 (attributed to the Boston “Herald”) [hereinafter *Mrs. Richter and the President*].

97. *Lodge Committee Hearings*, *supra* note 6, at 2310 *et seq.* (George G. Boardman), 1726 *et seq.* (Edward J. Davis), 2243 *et seq.* (Sergeant Isadore H. Dube), 2060 *et seq.* (Corporal D.J. Evans), 2881 *et seq.* (Sergeant Mark H. Evans), 1765 *et seq.* (Lieutenant Grover Flint), 2303 *et seq.* (Sergeant William J. Gibbs), 1969 *et seq.* (Sergeant Leroy E. Hallock), 2236 *et seq.* (Sergeant Richard V. Hughes), 2251 *et seq.* (Sergeant Januarius Manning), 2752 *et seq.* (Captain Fred McDonald), 2895 *et seq.* (Private Seiward J. Norton), 2544 *et seq.* (Corporal Richard T. O'Brien), 1529 *et seq.* (Sergeant Charles S. Riley), and 1538 *et seq.* (William Lewis Smith).

98. Kramer, *supra* note 7 (“The scale of abuses in the Philippines remains unknowable . . .”). Even defenders of the Army implicitly concede that American atrocities were significant, if not “the major” or “the most important feature” of Army activities during the Philippine-American War. John M. Gates, THE U.S. ARMY AND IRREGULAR WARFARE 24, <http://discover.wooster.edu/jgates/files/2011/11/fullbook.pdf> (last visited Sept. 10, 2016).

99. *Lodge Committee Hearings*, *supra* note 6, at 951 (“They did this, however, on their own responsibility and without orders from their superiors.”).

100. *Id.* at 655.

A much different impression was held by the Commanding General of the Army, General Nelson A. Miles after his inspection tour of the Philippines.¹⁰¹ Having cast serious doubt upon General Hughes' assertion that he knew of only one episode of water torture,¹⁰² General Miles made it clear that he thought the practice of water torture was widespread and undertaken with the knowledge of some senior officers:

These facts [concerning water torture] came to my notice in a casual way, and many others of similar character have been reported in different parts of the archipelago. In fact, I was informed that it was common talk at the places where officers congregated that such transactions had been carried on either with the connivance or approval of certain commanding officers.¹⁰³

The testimony of the junior officers and enlisted men also painted a different picture from that of Generals Funston and Hughes. First Lieutenant Jesse Lee Hall testified as to the results of water torture:

One of my sergeants was off on a scout and I asked him how he happened to capture so many guns and he told me he took a caribao horn and poured water through that into a native's mouth and made him give information as to where the guns were concealed. They captured about 60 or 70 guns that way.¹⁰⁴

First Lieutenant Grover Flint testified that he observed Filipinos being subjected to water torture as a matter of routine.¹⁰⁵ Corporal D. J. Evans testified that there was no effort to conceal an episode of water torture he witnessed, and that water torture was a matter of common knowledge – “it has been the talk of almost the whole army.”¹⁰⁶ Private Seiward J. Norton agreed with Senator Culberson's characterization that “the water cure [was] generally resorted to by the soldiers in the Philippines for the purpose of securing information,” and termed the practice

101. It should be noted that General Miles had a very difficult working relationship with President Roosevelt and Secretary Root. Edward Ranson, *Nelson A. Miles as Commanding General, 1895-1903*, 29 *MILITARY AFFAIRS* 179, 181 (1965) (“Theodore Roosevelt referred to Miles as a ‘brave peacock.’”), 198 (Roosevelt to Root: “I think that Miles must be given credit for more low cunning than we thought. What an irredeemable blackguard and scoundrel he is”); Welch, *supra* note 11, at 236 (“the he quarrelsome and independent-minded commanding general of the U.S. Army”); JONES, *supra* note 8, at 271 (“The contempt that Roosevelt and his army commander held for each other was deep and unbridled”). General Miles twice requested permission to go to the Philippines, in February and August of 1902. *Id.* at 193 (February 1902 request), 197 (August 1902 request). The first request was denied. *Id.* at 193. The second was granted to get General Miles out of the country and away from Congress and the press. *Id.* at 197. The report of his trip, given the press upon his return in April of 1903, was unfavorable to the administration. *Id.*

102. *Gen. Miles's Report*, *supra* note 63 (noting the work of Major Glenn and Glenn's brigade in water torture and commenting: “Whether it was possible for officers to be engaged in such acts without the personal knowledge of the General upon whose staff they were serving at the time, namely, Brig. Gen. Hughes, I leave for others to conjecture.”).

103. *Id.* But see Welch, *supra* note 11, at 237 (“Terror tactics never received the sanction of official policy either in Washington or Manila.”).

104. *Lodge Committee Hearings*, *supra* note 6, at 2430.

105. *Id.* at 1769-72.

106. *Id.* at 2062; WITT, *supra* note 34, at 359 (“Members of [Major Edwin F.] Glenn's torture team did their work with little secrecy or shame.”).

“prevalent.”¹⁰⁷

But we need not rely exclusively on the incomplete record of the Lodge Committee. Acting as an epidemiologist of torture, Professor Christopher Einolf within the past few years has used official documents, press reports, and private writings to trace the origin, spread, and frequency of torture by our soldiers in the Philippine-American War.¹⁰⁸ His work fills an important void left by the Lodge Committee.¹⁰⁹

In his recent study, Professor Einolf finds that the Army did not use torture during the conventional-war phase of the Philippine-American War, from February to November of 1899.¹¹⁰ Our soldiers began to use torture quickly once the guerrilla-war phase of the conflict began in November of 1899, but it took some time for the practice to spread.¹¹¹ For the first eight months of the guerrilla-war phase of the Philippine-American War the Army’s use of torture was confined to central Luzon. During this period, Professor Einolf observes, the methods of torture were a function of local innovation and included both “beating and slow hanging” as well as water torture.¹¹² Individual officers in the field began experimenting with water torture during the first six months of the guerrilla-war phase; the water cure was used as early as March of 1900.¹¹³

In the fall of 1900 the Filipinos launched an offensive that took the Americans by surprise.¹¹⁴ Concluding that the existing benevolent policy was ineffective, the senior leadership of the Army in the Philippines shifted policy:

In December MacArthur finally authorized the full use of the penalties for guerrilla activity provided in General Orders 100. By this time, most field commanders had already put the provisions of General Orders 100 into effect on their own initiative, so in most places MacArthur’s order merely authorized what his subordinates were already doing. By the end of 1900, soldiers across the Philippines were also using torture¹¹⁵

The use of torture spread from central Luzon to other parts of the Philippines during the campaigns undertaken from the fall of 1900 to the spring of 1901, and the

107. *Lodge Committee Hearings*, *supra* note 6, at 2899-2900.

108. *See generally* EINOLF, *supra* note 64.

109. *See* Welch, *supra* note 11, at 234 (finding but not identifying “fifty-seven verifiable instances when American soldiers committed atrocities[]” in the Philippine-American War, including fourteen instances of “administration of the ‘water cure[.]’”).

110. EINOLF, *supra* note 64, at 37; *see also* Oswald, *supra* note 61, at 30 n.64 (“As a matter of practice, use of the water cure was tacitly sanctioned and widespread in the latter part of the war.”).

111. EINOLF, *supra* note 64, at 42. Professor EINOLF reports that the first documented case of torture, which involved beating and not water torture, occurred on December 27, 1899. *Id.* at 43; *see also* Welch, *supra* note 11, at 236.

112. EINOLF, *supra* note 64, at 37.

113. *Id.* at 51-59 (suffocation by tightening ropes on neck and chest, beating, hanging, mock execution, thirst, and water torture).

114. *Id.* at 62.

115. *Id.* at 63. General MacArthur’s order specifically excepted the torture of prisoners from his general order. JONES, *supra* note 8, at 206 (“[T]he more drastic the application the better,” MacArthur instructed, ‘provided only, that unnecessary hardships and personal indignities shall not be imposed upon persons arrested and that the laws of war are not violated in any respect touching the treatment of prisoners.’”).

water cure became the standard method of torture.¹¹⁶ As water torture became “a widespread and tacitly accepted practice by the beginning of 1901,” senior officers stopped issuing orders prohibiting torture, investigations into episodes of torture became rare, and courts-martial for torture became infrequent.¹¹⁷

The progression of torture was uneven. As early as 1900, Professor Einolf reports, “On Panay, Major [Edwin F.] Glenn turned torture into a standard operating procedure, using it as a matter of routine.”¹¹⁸ The use of torture increased with the increase in combat, but did not end with the effective cessation of fighting:

The period from mid-1900 to mid-1901 saw both the highest level of fighting in the counterinsurgency war and the most frequent use of torture. The water cure spread from its origin in central Luzon to the rest of Luzon and several other islands. On Panay, Captain Glenn oversaw the development of one or more intelligence-gathering squads that refined the torture to a well-practiced “water detail” and used it routinely. By the middle of 1901, local troops continued to use torture even in areas where the insurgency was no longer active¹¹⁹

The water torture of Joveniano Ealdama at the end of November, 1900, was not unique; Professor Einolf concludes that the “Igaras incident was only the best documented instance of what appears to have been a widespread practice.”¹²⁰ By the spring of 1901 the use of torture was widespread and its use had become common knowledge among officers in the field.¹²¹ Combat operations were winding down but torture continued:

As the spring campaign season drew to a close in 1901, the guerrilla war seemed essentially over Despite these successes, the army continued to use torture and increased the use of other forms of violence against noncombatants even in areas where the guerrilla threat had essentially ceased¹²²

Professor Einolf concludes that “torture had become so common and accepted in the Philippines that soldiers used it even in regions where the insurgency no longer constituted a serious threat.”¹²³

On September 28, 1901, the Filipinos attacked the American garrison at Balangiga on the Island of Samar.¹²⁴ Infiltrating the American camp dressed as civilians, the insurgents attacked during breakfast, killing forty-eight of the seventy-four American soldiers.¹²⁵ Fueled in part by questionable accounts of prisoner

116. EINOLF, *supra* note 64, at 61, 64-67, 73, 75-76 (northern Luzon, southern Luzon, Panay, and other islands).

117. *Id.* at 61.

118. *Id.* at 63.

119. *Id.* at 75-76.

120. *Id.* at 72; WITT, *supra* note 34, at 356 (“We can document with certainty fourteen instances in which United States forces administered the water cure. But that figure is almost surely a small fraction of the total.”).

121. EINOLF, *supra* note 64, at 76-77.

122. *Id.* at 79.

123. *Id.* at 94 (citing “reports of torture from Mindanao, Marinduque, [and] south-eastern Luzon”).

124. JONES, *supra* note 8, at 219-21.

125. Dressing in disguise was a *ruse de guerre* successfully used by the Americans and their indigenous minions six months earlier in the capture of Filipino leader Emilio Aguinaldo. One commentator has written that the use of disguise to capture Aguinaldo “was an impetuous breach of the basic laws of war,”

executions and the mutilation of bodies, the “Balangiga Massacre” marked an increase in the use of torture by the Americans.¹²⁶

It was at this point on the island of Samar, reports Professor Einolf, that “the army adopted the most violent methods of the entire war.”¹²⁷ The Americans had used water torture on Samar as early as June of 1901, but the situation intensified after the incident at Balangiga with the arrival of Brigadier General Jacob H. Smith.¹²⁸ Smith was later court-martialed, convicted, and forced from the Army for the orders he admitted giving subordinates on Samar:

[T]hat he did give certain instructions relating to hostiles under arms in field, and instructed him not to burden himself with prisoners, of which he, General Smith, already had so many that efficiency his command was impaired; that he did tell him he wanted [him to] kill and burn in [the] interior and hostile country; further instructed him that the interior of Samar must be made a howling wilderness, and further instructed him that he wanted all persons killed who were capable of bearing arms and were engaged in hostilities against United States, and that he designated age limit 10 years, as boys that age were actively engaged hostilities against United States authorities, and were equally dangerous as an enemy as those of more mature age.¹²⁹

The new level of ferocity in the American effort on Samar included the use of water torture.¹³⁰ In one episode, First Lieutenant Julien E. Gaujot subjected three priests to the water cure, apparently on the verbal direction of Major Edwin Glenn.¹³¹ Only the intervention of another officer saved the priests from execution. As was the case even before Balangiga, in the final phase of the conflict even when their soldiers were in no danger commanders in the field continued to use torture.¹³²

Professor Einolf’s study allows us to re-evaluate earlier papers on torture in the Philippine-American War. One such earlier work is an Army War College study in which the author, Lieutenant Colonel Mark Oswald, argued that the last campaign of the war—on Samar following the Balangiga event of September 28, 1901—was so different in kind from what preceded it that it changed the popular attitude toward the American experience in the Philippines:

[T]he Army’s remarkable historical record of the war is distorted by popular myth and superficial ideological interpretations surrounding the last campaign of the war – the island of Samar. Sensational public revelations of alleged atrocities in the conduct of the Samar campaign led to even more sensationalized courts-martial of

and that “the use of enemy garb was clearly unlawful.” WITT, *supra* note 34, at 355. Another deems the use of disguise merely “a wily stratagem considered unsportsmanlike by the army’s anti-imperialist critics at home.” GATES, *supra* note 98, at 23.

126. EINOLF, *supra* note 64, at 81; Welch, *supra* note 11, at 238. Other harsh measures were also increased. Oswald, *supra* note 61, at 6.

127. EINOLF, *supra* note 64, at 87.

128. *Id.* at 88-89.

129. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1336 (cable of May 5, 1902, from Major-General Adna Chaffee to Adjutant-General’s Office, May 5, 1902); EINOLF, *supra* note 64, at 89.

130. EINOLF, *supra* note 64, at 90.

131. *Id.* at 90-91.

132. *Id.* at 91-92 (for example, in Mindanao, submersion, in Marinduque, water cure, and in south-eastern Luzon, torture by hanging followed by execution).

American officers charged with violations of the laws of war. Reports of United States military atrocities and graphic revelations of the war's brutality during the Samar campaign courts-martial had a significant effect upon American public attitude.¹³³

In this interpretation, the misconduct of American soldiers was limited to a few officers in the Samar campaign.¹³⁴

Colonel Oswald's argument, that the aberrational exploits of a handful of officers during the Samar campaign ruined the war for all the other commanders and garrison officers whose professionalism and extraordinary talents did not allow torture or other illegalities, does not withstand the evidence developed by Professor Einolf. Professor Einolf demonstrates that American soldiers began to use torture quickly after the guerrilla phase of the conflict began in November of 1899,¹³⁵ not after the Balangiga incident of late September, 1901, as Colonel Oswald argues.¹³⁶ While Professor Einolf demonstrates that the use of torture intensified after Balangiga,¹³⁷ the fact that torture was widely used prior to Balangiga precludes Colonel Oswald's attempt to confine blame for torture to a handful of officers in the Samar campaign. Professor Einolf's study also demonstrates that the use of torture was eventually widespread geographically, not limited to areas involved in the Samar campaign as Colonel Oswald argues.¹³⁸ The modern analysis does not permit the blame for American torture in the Philippine-American War to be cabined to a handful of officers in the Samar campaign.

The Lodge Committee established that American soldiers used water torture in the Philippine-American War. Professor Einolf chronicles the development and scope of the practice, and establishes that water torture was widespread. The record is also clear as to whether the use of water torture in the Philippine-American War was productive. Dealing with information produced by torture there is always the possibility that the victim will provide false information simply to end the torture. A century ago Mark Twain noted the problem:

[General] Funston's example has bred many imitators, and many ghastly additions to our history: the torturing of Filipinos by the awful "water-cure," for instance, to make them confess – what? Truth? Or lies? How can one know which it is they are telling? For under unendurable pain a man confesses anything that is required of him, true or false, and his evidence is worthless.¹³⁹

The inconvenient possibility that those being tortured will either refuse to talk

133. Oswald, *supra* note 61, at 1.

134. *Id.* at 7.

135. JONES, *supra* note 8, at 130-31.

136. EINOLF, *supra* note 64, at 37 ("The American army's use of torture in the Philippines began shortly after it began fighting a guerrilla opponent."); JONES, *supra* note 8, at 147 (tracing adoption of an "ethos of reprisal" to the spring of 1900, "with guerrilla attacks spiking across the islands.").

137. EINOLF, *supra* note 64, at 88-90.

138. *Id.* at 75.

139. Mark Twain, *A Defence of General Funston*, *supra* note 63, at 623; William Loren Katz, *Using the "Water Cure" in the Philippines. Waterboarding in American History* (Nov. 9, 2007), <http://www.freedom4um.com/cgi-bin/readart.cgi?ArtNum=65792> (quoting Mark Twain).

or will lie was with us from our beginnings as a nation,¹⁴⁰ was recognized by those who tortured Americans in World War II,¹⁴¹ and it is with us still.¹⁴²

But the testimony before the Lodge Committee is clear that in the Philippine-American War, the use of water torture often produced valuable information. The Lodge Committee heard about numerous instances where Filipinos were subjected to water torture in an effort to ascertain the location of guns. While some of the instances were unproductive,¹⁴³ in other cases guns were in fact produced after the water torture.¹⁴⁴

President Roosevelt's first imperative was to discover and acknowledge every instance of cruelty and barbarity. One has to conclude from the water-torture cases that his administration was—apparently by calculation—wholly ineffective in discovering and disclosing to the public the facts of water torture by Americans in the Philippines.

At a number of junctures, the administration and its imperialist allies on the Lodge Committee attempted to limit the information available to the public. At the start of the process, administration allies on the Lodge Committee were accused of attempting to limit press coverage of the proceedings.¹⁴⁵ General Otis attempted to censor the stories journalists could file from the Philippines.¹⁴⁶ The Postmaster General refused to deliver anti-war pamphlets to the Philippines.¹⁴⁷ Senator Lodge was forced to produce a report about conditions in Batangas.¹⁴⁸ The administration withheld a critical report of Major Cornelius Gardener, then civil governor of Tabayas, until the minority demanded that it be produced.¹⁴⁹

There were multiple conflicts about which witnesses to call, with the administration's imperialist allies on the Lodge Committee able to block witnesses

140. WITT, *supra* note 34, at 39 (“[In 1781, Light Horse Harry] Lee and his men tortured a Loyalist militia member by burning the soles of his feet with a red-hot shovel in a futile attempt to extract information relating to the whereabouts of Cornwallis’s forces.”).

141. INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, JUDGMENT OF NOV. 4, 1948, 518 [hereinafter INTERNATIONAL MILITARY TRIBUNAL] (quoting a Japanese manual *Notes for the Interrogation of Prisoners of War*: “Care must be exercised when making use of rebukes, invectives or torture as it will result in his telling falsehood and making a fool of you.”).

142. The Senate Select Committee on Intelligence found that the information gained through the water torture of Khalid Shaykh Mohammad included “significant fabricated information.” *Select Committee Report*, *supra* note 4, at page 85 of Executive Summary. It concluded: “The C.I.A.’s use of enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees.” *Id.* at page 2 of Findings and Conclusions.

143. *Lodge Committee Hearings*, *supra* note 6, at 1771, 2883-84 (no guns from Filipinos who were tortured); EINOLF, *supra* note 64, at 65 (water cure “failed to get any guns.”).

144. *Lodge Committee Hearings*, *supra* note 6, at 1765-67, 2327, 2340 (water cure usually effective to produce guns).

145. *More Talk*, *supra* note 86 (reporting “a sharp clash between Mr. Lodge . . . and Mr. Patterson . . . over the admission of representatives of the press . . .”).

146. JONES, *supra* note 8, at 124, 166.

147. *Id.* at 161.

148. *Id.* at 302.

149. *Friction in Philippines, Gov. Gardener Charges Army with Using Harsh Methods, Natives Being Turned Against This Country, He Declares – His Withheld Report Given Out*, N.Y. TIMES (April 11, 1902) [hereinafter *Friction in the Philippines*]; JONES, *supra* note 8, at 278, 300.

requested by the minority.¹⁵⁰ One episode illustrates the pattern:

Mr. Lodge said that the minority of the committee had suggested that Aguinaldo, Sixto Lopez, Mabini, and some prisoners of war on the Island of Guam; H.M. Bray, an agent of the Filipino junta at Hongkong, and two Associated Press correspondents, Mr. Collins at Peking and Mr. Martin in Venezuela, be called as witnesses. The committee decided not to call them for various reasons. The committee thought that the testimony of Filipino prisoners was not desirable; Bray was a British subject and the two correspondents were inaccessible. Admiral Dewey and Gen. Anderson, he said would appear as witnesses, and the list of witnesses was of sufficient length to occupy the committee until the adjournment of Congress.¹⁵¹

Having suppressed his report, the imperialist majority refused to call Major Gardener as a witness.¹⁵² Senator Tillman “indicated his belief that information was being ‘smothered’” while Senator Carmack “declared that the report made by Major Gardener was so startling and important that the Secretary of War had endeavored to keep it from the Senate and from the American people.”¹⁵³

The imperialists on the Lodge Committee refused to allow any Filipinos to be called as witnesses; Senator Hoar “urged that in fairness and justice some Filipinos ought to be called to give their testimony before the committee in defense of the charges which had been made against them.”¹⁵⁴ The anti-imperialists then asked that the Lodge Committee, or a sub-committee, be sent to the Philippines: “The Democrats . . . will insist that the Philippine Committee shall go to the archipelago this Fall and shall continue there the investigation which is now going on here.”¹⁵⁵ Although Senator Lodge had at one point indicated a willingness to send an investigative committee to the Philippines, the Lodge Committee never went to the Philippines, never sent a sub-committee to the Philippines, and never heard the testimony of a single Filipino.¹⁵⁶ And once witnesses appeared before the Lodge Committee, the majority interposed technical evidentiary objections to block damaging portions of their testimony.¹⁵⁷

Despite the initial decision of President Roosevelt and Secretary Root to court-martial one central defendant, Major Edwin F. Glenn, in San Francisco, all of the officers court-martialed for water torture were tried in the Philippines.

150. JONES, *supra* note 8, at 298 (“Henry Cabot Lodge had managed to shield the [P]resident in the plodding Senate investigation of U.S. conduct in the Philippines. In more than two months of hearings, Lodge had limited the witness list to senior military commanders and administration officials.”).

151. *The Philippine Inquiry Senate Minority*, N.Y. TIMES (May 1, 1902) [hereinafter *Philippine Inquiry*].

152. *Will Not Call Maj. Gardener*, *supra* note 91; see also JONES, *supra* note 8, at 318 (“[Lodge] managed to block a Democratic attempt to expand the investigation by summoning Major Cornelius Gardener and Filipino revolutionary leaders as witnesses.”).

153. *Philippine Inquiry*, *supra* note 151.

154. *Philippine Question Up In The Senate*, *supra* note 94.

155. *To Send a Committee to the Philippines*, N.Y. TIMES (May 8, 1902) (reporting “[t]he Democrats . . . are confident that the Republicans will not seriously oppose it, and are quite sure that they can put it through.”).

156. *Will Not Call Maj. Gardener*, *supra* note 91 (“The question of sending a sub-committee to the Philippines to continue the investigation was passed over.”); JONES, *supra* note 8, at 318 (“[A]s a concession to the growing outrage, [Senator Lodge] hinted that he was willing to dispatch an investigative committee to the Philippines.”).

157. See *supra* note 95.

Even after the conclusion of hostilities the Roosevelt administration continued the pattern of withholding material from the public. Secretary Root attempted to keep the investigative report of the Commanding General of the Army, General Nelson A. Miles, from the public,¹⁵⁸ and when he was Secretary of War, William Howard Taft suppressed an official history of the war.¹⁵⁹

President Roosevelt's imperative that there be full disclosure was simply not fulfilled.

President Roosevelt declared victory in the Philippines on July 4, 1902.¹⁶⁰ Opposition to the war remained strong.¹⁶¹ Senator Hoar's opposition could be traced in his references over time to the concept of glory. In 1900, on the floor of the Senate, he saw the glory the nation had within its grasp:

We had won the glory of a great liberator in both hemispheres. The flag of Spain – emblem of tyranny and cruelty – had been driven from the western hemisphere, and was soon to go down from her eastern possessions The glory of this achievement was unlike any other which history has recorded The glory of the war and of the victory was that it was a war and a victory in the interest of liberty. The American flag had appeared as a liberator in both hemispheres; when it floated over Havana or Santiago or Manila¹⁶²

He returned to the Senate floor in 1902 to mark the glory we might have gained:

The practical statesmanship of the Declaration of Independence and the Golden Rule would have cost nothing but a few kind words. They would have brought for you great title of liberator and benefactor They would have bought for you undying gratitude of a great and free people and the undying glory which belongs to the name of liberator.¹⁶³

But we had chosen a different path, and Senator Hoar surveyed the result: "From the Philippines you have brought home nothing of glory."¹⁶⁴

Earlier in the spring of 1902, before President Roosevelt declared our national mission accomplished, Mark Twain wrote a scathing characterization of the war:

There have been lies; yes, but they were told in a good cause. We have been treacherous; but that was only in order that real good might come out of apparent evil. True, we have crushed a deceived and confiding people; we have turned

158. *Gen. Miles's Report*, *supra* note 63 ("It was the intention of Secretary Root to keep this document [General Miles's February, 1903 report] from publicity . . ."); JONES, *supra* note 8, at 344.

159. Gates, *supra* note 98, at 21 ("[I]n 1906 and in 1908, [Secretary of War] William Howard Taft quashed John R. M. Taylor's attempt to publish an officially sponsored history of the war, along with translations of a number of documents captured from the Filipino revolutionaries, because he thought that Taylor's work might alienate people in both the Philippines and the United States.").

160. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1350-51 (cable of July 2, 1902 from Secretary of War Elihu Root by General Corbin to General Adna Chaffee).

161. Henry Clay Kinne, INIQUITY IN HIGH PLACES AS REVEALED IN THE AMERICAN-SPANISH-FILIPINO WARS OF 1898, 1899 AND SUBSEQUENT YEARS 241 (San Francisco, 1908) ("[P]ossession [of the Philippines] is a badge of the damning disgrace achieved in waging a most infamous and most iniquitous war . . .").

162. Hoar, *The Lust of Empire*, *supra* note 34, at 4-5.

163. *Subjugation*, *supra* note 44.

164. *Id.*

against the weak and the friendless who trusted us; we have stamped out a just and intelligent and well-ordered republic; we have stabbed an ally in the back and slapped the face of a guest; we have bought a Shadow from an enemy that hadn't it to sell; we have robbed a trusting friend of his land and his liberty; we have invited our clean young men to shoulder a discredited musket and do bandit's work under a flag which bandits have been accustomed to fear, not to follow; we have debauched America's honor and blackened her face before the world; but each detail was for the best. We know this.¹⁶⁵

Twain may have been right about the war. He was wrong, however, when he predicted the future of the Philippines: "We have got the Archipelago, and we shall never give it up."¹⁶⁶ In 1934 the people of the Philippines were promised independence after a ten-year period of preparation.¹⁶⁷ The Philippines gained independence on July 4, 1946.¹⁶⁸ It is telling, however, that Independence Day in the Philippines is not celebrated on July 4, the anniversary of the 1946 transfer. It is celebrated on June 12, the anniversary of the 1898 declaration of independence.¹⁶⁹

III. FAIR PUNISHMENT: LEGAL CONSEQUENCES OF WATER TORTURE IN THE PHILIPPINE-AMERICAN WAR

The use of the water cure during the Philippine-American War raised questions of whether the interrogation technique constituted torture and whether it was lawful. It appears that there was a broad consensus among political leaders and top military officers that the water cure constituted torture.¹⁷⁰ President Roosevelt and Secretary Root characterized the water cure as a form of torture, a violation of law and humanity, and an act of "cruelty and barbarity."¹⁷¹ Members of the Lodge

165. Mark Twain, *To the Person Sitting in Darkness*, *supra* note 35, at 174.

166. *Id.* at 175.

167. The pathway to Filipino independence was established by the 1934 Philippine Independence Act, which provided a ten-year transition to independence. The Japanese invasion and occupation of the Philippines during World War II necessitated an extension of the transition period.

168. Treaty of General Relations Between the United States of America and the Republic of the Philippines, signed at Manila, on 4 July 1946, 7 U.N.T.S. 4 (1947), <https://treaties.un.org/doc/Publication/UNTS/Volume%207/v7.pdf>.

169. President Diosdado Macapagal, *Declaring June 12 as Philippine Independence Day*, Proclamation No. 28, s. 1962 (noting that "June 12, 1898, marked our people's declaration and exercise of their right to self-determination, liberty and independence[]" and that "such a historic and inspiring action was a legitimate assertion by the Filipino nation of their natural and inalienable claim to freedom and independence, which is an inherent right of every people not dependent upon the will and discretion of another . . .").

170. Richard Prevost, *Water Cure: U.S. Policy and Practice in the Philippine Insurrection* 6 n.16, <http://www.vsb.org/docs/sections/military/water.pdf> ("[T]he water cure was considered 'torture' as that term was used during the period."). Modern writers also refer to the water cure as torture. Barnett, *supra* note 7, at 89 ("torture"); EINOLF, *supra* note 64, at 37 ("[T]echniques of water torture."); Tuchman, *supra* note 48, at 163 (referring to "applying the 'water cure' and other tortures to obtain information."); JONES, *supra* note 8, at 2 ("Water torture left no marks.").

171. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, V. 2, *supra* note 14, at 1328 (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee). However, in a private letter of July 1902, President Roosevelt described the water cure as only "mild torture":

[N]ot a few of the officers, especially those of the native scouts, and not a few of the enlisted men, began to use the old Filipino method of mild torture, the water cure. Nobody was seriously damaged, whereas the Filipinos had inflicted incredible tortures upon our

Committee from both the imperialist majority¹⁷² and the anti-imperialist minority¹⁷³ referred to the water cure as torture,¹⁷⁴ as did Senator Hoar,¹⁷⁵ Governor William Howard Taft,¹⁷⁶ Commanding General of the Army Nelson A. Miles,¹⁷⁷ Army Judge Advocate General George B. Davis,¹⁷⁸ and Major-General H. C. Corbin, Adjutant-General to Major-General Chaffee.¹⁷⁹ Major Cornelius Gardner, civil governor of Tayabas Province, referred to the water cure as torture in his official report.¹⁸⁰ General Frederick Funston referred to the water cure as torture both when he denied any personal knowledge of it being used,¹⁸¹ and when he endorsed the water cure as being “one of the most humane” methods of torture.¹⁸² Only one member of the Lodge Committee, imperialist Republican Senator Albert J. Beveridge of Indiana, questioned the characterization of the water cure as torture during the hearings.¹⁸³

Characterization of the water cure as torture can also be found in the public discussion. One citizen referred to the water cure as that “type of torture that has been administered in the Philippine Islands by men who have disgraced the uniform they continue to wear,” and opined that:

[T]he tortures inflicted upon the Filipinos could not with impunity be employed (and overlooked) on the Continent of North America. That fact clearly exposes the cowardliness of the torture schemes which even the War Department and the majority of Congress can scarcely afford to condone and reward.¹⁸⁴

A soldier who had witnessed the water cure by American troops wrote from the Philippines, characterizing it as torture and giving his opinion of its use:

Do you or any other white man with human blood in his veins think that such work

own people. Nevertheless, torture is not a thing that we can tolerate. I have bestowed rewards and praise liberally for all of the good deeds that have been done there. But it was necessary to call some of those who were guilty of shortcomings to sharp account.

Theodore Roosevelt, Letter from Theodore Roosevelt to Freiherr Hermann Speck von Sternburg, July 19, 1902, Theodore Roosevelt Papers, Manuscript Division, The Library of Congress.

172. *Lodge Committee Hearings*, *supra* note 6, at 72, 1731, 1765-67, 1769, 1969, 1978, and 2243 (Lodge); 1536, 1772 (Burrows); and 1735 (Dietrich).

173. *Id.* at 1771 (Carmack); 1536, 1733, 2778, 2858, and 2869 (Culberson); 2431 (Dubois); 655, 1770, 1776, 1979, 1981, 2296, 2882, and 2899 (Paterson); 853, 1530, 1729, 1731, 1735, 1970-73, 1975, 1977-78, and 2431 (Rawlins).

174. Other Senators used the torture nomenclature. *Army Bill Goes Through*, N.Y. TIMES, Feb. 1, 1901 (Senator Henry M. Teller).

175. Subjugation, *supra* note 44 (“[T]he horror of the water torture.”).

176. *Lodge Committee Hearings*, *supra* note 6, at 75 (“[T]here have been in individual instances of water cure, that torture which I believe involves pouring water down the throat . . .”).

177. *Gen. Miles’s Report*, *supra* note 63.

178. *Cruelty in Philippines: Judge Advocate General Davis Censures Capt. Brownell*, N.Y. TIMES, Mar. 7, 1903 (“[A] resort to torture with a view of obtaining confessions . . .”).

179. *Lodge Committee Hearings*, *supra* note 6, at 1549 (“[T]he form of torture known as the ‘water cure’ . . .”).

180. *Friction in Philippines*, *supra* note 149.

181. *Lodge Committee Hearings*, *supra* note 6, at 951.

182. *Id.* at 2261 (“I understand [the water cure] is one of the most effective methods and one of the most humane, if such a word can be used in connection with torture of any kind.”).

183. Senator Beveridge questioned whether the soldiers in the Philippines referred to the water cure as torture. *Lodge Committee Hearings*, *supra* note 6, at 1979. He also questioned whether others distinguished between the water cure and torture. *Id.* at 2777-78.

184. L. Benson, *Comment on the “Water Cure,”* N.Y. TIMES, July 7, 1902 (letter to the editor).

as this is justice. I say no. Such work is hellish savagery, equal to butchery, and ought to be stopped. It is a disgrace to humanity and civilization.

....

If we can't beat these Filipinos in a fair fight with 65,000 troops without torturing them, then I say, and not I alone, but a lot of other soldiers, lets throw up the sponge.¹⁸⁵

Another soldier described the water cure and concluded: "They swell up like toads. I'll tell you it is a terrible torture."¹⁸⁶ Of course the consensus that the water cure was torture did not extend to some officers and soldiers in the Philippines, especially those who inflicted it on Filipinos, and their apologists at home.¹⁸⁷

The second question was whether use of the water cure violated the rules under which the Army was to operate in the field. During the Philippine-American War the rules under which the Army operated were those that had been adopted during the Great Rebellion.¹⁸⁸ Primarily drafted by a law professor, German émigré Francis Lieber, the "Lieber code" was promulgated in the spring of 1863.¹⁸⁹ Thus when the Lodge Committee inquired of Secretary Root "[a]s to orders governing our soldiers in the Philippines," he responded with a copy of the Lieber code, noting that the Lieber code rules "are to-day, as they have been at all times since 1863, the practical and effective guide and rule of conduct to which every officer understands he must conform."¹⁹⁰

The short answer to the question of legality is that use of the water cure on Filipino prisoners to extract from them confessions of participation in the resistance to the American occupation, including associated information as to the location of resistance forces or weapons, was a clear violation of Rule 16 of the Lieber code: "Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge . . . nor of torture to extort confessions . . ."¹⁹¹

The introductory language referring to "military necessity" is particularly

185. *Given the Water Cure*, *supra* note 62.

186. A.F. Miller, OMAHA WORLD, Mar. 5, 1900 (letter to the editor).

187. Major Edwin Glenn argued through counsel at his trial that the water cure was "not dangerous to life and not especially painful, although it is unpleasant . . ."; *Glenn Court-Martial Ended: Defense of Accused Major Is That the Water Cure Is Not Dangerous and Was Justified*, CHICAGO TRIBUNE, June 7, 1902, at 3. Referring to the water torture of the mayor of Igbaras, Captain Fred McDonald testified: "The results could not have been very bad as he immediately arose from his back and mounted his horse and road into the mountains, almost the entire day with us, without showing any ill effect of his imbibing aqua pura." *Lodge Committee Hearings*, *supra* note 6, at 2780-81 (testimony of Captain Fred McDonald). Imperialist Republican Senator Charles Henry Dietrich of Nebraska thought the water torture relatively benign: "Do you not think from what you have learned that the water cure is much less harmful than the vino that was drunk by many of our soldiers voluntarily?" *Id.* at 2431-32. The witness, Jesse Lee Hall, agreed with Senator Dietrich's bizarre proposition: "I imagine it would be less harmful, yes, than vino." *Id.* Governor William Howard Taft alluded to "some rather amusing instances of Filipinos who came in and said they would not say anything until they were tortured; that they must have an excuse for saying what they proposed to say." *Id.* at 75-76.

188. WITT, *supra* note 34, at 356.

189. WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, Apr. 24, 1863 (the "Lieber code"), reproduced at *Lodge Committee Hearings*, *supra* note 6, at 971-82.

190. *Id.* at 949-50.

191. Lieber code, *supra* note 189, Rule 16; *Lodge Committee Hearings*, *supra* note 6, at 949-50.

important. Under the Lieber code, military necessity “consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”¹⁹² Under the Lieber code, a finding of military necessity allowed for a broad range of actions:

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.¹⁹³

But Rule 16 of the Lieber code provides a short list of actions that are flatly prohibited, even with a showing of military necessity.¹⁹⁴ One of those prohibited actions is “torture to extort confessions.”¹⁹⁵ Using the sections of the Lieber code identified by Secretary Root, there are other ways in which the code prohibited the use of water torture.¹⁹⁶ But Rule 16 was the most direct and powerful prohibition because it existed without regard to military necessity.

How might one have established the predicates for Rule 16 and the other Lieber code rules that would potentially have been violated by use of water torture to extract confessions or other information from Filipino prisoners? Establishing that the water cure constituted torture, cruelty, intentional suffering or indignity, violence, disgrace,

192. Lieber code, *supra* note 189, Rule 14.

193. *Id.*, Rule 15; WITT, *supra* note 34, at 184 (“Outside of torture, virtually all destruction seemed permissible so long as it was necessary to advance a legitimate war effort.”).

194. *Id.* at 4 (“The [Lieber] code ruled out only four acts: torture, assassination, the use of poison, and perfidy in violation of truce flags or agreements between warring parties.”).

195. Lieber code, *supra* note 189, Rule 16; WITT, *supra* note 34, at 184, 236 (“Lieber allowed one important but narrow exception to the necessity principle: torture. Some kinds of pain counted as cruel even where the pain was inflicted for the sake of the war effort. ‘No doubt,’ Lieber said, ‘the whole world would condemn it as cruel, if pain were inflicted upon an enemy to extract an important secret – e.g., by application of torture.’”) (“To be sure, the necessity principle did not sweep the field, displacing all constraint . . . And while many of the limits in the code contained overrides for necessity, others did not. Lieber said that necessity did not permit ‘torture to extort confessions’ or ‘the use of any violence against prisoners’ to extract information.”).

196. *Lodge Committee Hearings*, *supra* note 6, at 949-50. Rule 44 prohibits “[a]ll wanton violence committed against persons in the invaded country” Rule 56 provides “[a] prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.” Rule 75 provides that “[p]risoners of war . . . are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity” Rule 80 provides “[h]onorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.” In addition, Rule 76, not cited by Secretary Root, is arguably applicable: “Prisoners of war shall be . . . treated with humanity.”

barbarity, or that use of the water cure was not treating captives with humanity, would have required consideration of the physical and mental effects of the procedure on the Filipino prisoners.

Lieutenant Grover Flint testified that: “A man suffers tremendously; there is no doubt about it,” and that, “[h]is suffering must be that of a man who is drowning, but who can not drown.”¹⁹⁷ Sergeant Seiward Norton, who participated in water torture, said that it “produced temporary strangulation or that there was a danger of it.”¹⁹⁸ Sergeant Isadore Dube described another Filipino victim of water torture: “He was a dark-complexioned native and he turned very white; he turned pale as though he was a picture of death.”¹⁹⁹ Sergeant William Gibbs testified that during the water torture “the native stiffened; that is, he appeared – I thought he was going to die then.”²⁰⁰ It was reported that at least one Filipino died as a result of the water torture.²⁰¹

Assuming the water torture practiced by American soldiers on Filipinos caused the same type of harms as are caused by the modern waterboarding, or worse, it is helpful to note the modern evidence. One modern commentator described the effects:

As you first think of it, the practice might seem rather mild compared to other forms of torture. But the effects are dramatic and severe. The inhalation of water causes a gag reflex, from which the victim experiences what amounts to drowning and feels that death is imminent.

Waterboarding is a viscerally effective, coercive interrogation technique designed to overcome the will of the individual. It causes severe physical suffering in the form of reflexive choking, gagging, and the feeling of suffocation. Indeed, if uninterrupted, waterboarding can cause death by suffocation. The victim immediately realizes this on the most basic level. By producing an experience of drowning, and eliciting a visceral panic response, it causes severe mental pain and suffering, distress, and the terror of imminent death. A medical expert on torture has testified that waterboarding “clearly can result in immediate and long-term health consequences. As the prisoner gags and chokes, the terror of imminent death is pervasive, with all of the physiologic and psychological responses expected Long term effects include panic attacks, depression and PTSD.”²⁰²

During the Philippine-American War, one modern author suggests, “[a]dministering the water cure was considered a violation of [the Lieber code] and was officially proscribed.”²⁰³ Authorities at the time agreed that water torture was a

197. *Id.* at 1767-68.

198. *Id.* at 2896-98.

199. *Id.* at 2249.

200. *Id.* at 2896-98; JONES, *supra* note 8, at 2 (“Water torture left no marks, but it inflicted excruciating pain and terror. Victims experience the simultaneous sensations of drowning and of being burned or cut as internal organs stretched and convulsed.”).

201. *Lodge Committee Hearings*, *supra* note 6, at 2303 (“One man died in Catbalogan.”). The Lodge Committee did not hear testimony about the deaths of Father Augustin de la Pena and Vincente Luna.

202. Kanstroom, *supra* note 83, at 270-71.

203. OSWALD, *supra* note 61, at 30 n.64; WITT, *supra* note 34, at 358-59 (“[T]here seemed to be no getting around the question of torture. Torture was one of the few things that [the Lieber code] had ruled out as definitively unlawful It did not seem possible to justify torture by reference to the 1863

violation of the rules of war. In testimony before the Lodge Committee, Colonel Arthur L. Wagner, Assistant Adjutant-General, U.S. Army, who spent almost two and a half years in the Philippines and who studied the practices of the Army for the preparation of a report to the commanding General of the Department of North Philippines, was asked about water torture:

Senator Culberson. I will ask you if you are familiar enough with the so-called water cure to state whether or not that would be authorized by the rules of war? . . .

Col. Wagner. There is nothing in regard to the laws of war that justifies torture for the purpose of getting information. The laws of war do justify the infliction of death, in some cases, for giving misinformation or refusing to give information.

Q. Do not the laws of war specifically condemn torture for the purpose of getting information?

A. They do²⁰⁴

Communications from Secretary Root to Chairman Lodge indicate that the War Department considered the administration of the water cure to be a “violation of the laws of war or of the regulations and orders governing the operation of the Army of the United States in the field.”²⁰⁵ Further evidence that the water cure was considered a violation of the Lieber code is found in the communications between the War Department and the Philippines ordering that officers identified in Lodge Committee testimony as having been involved in the water torture of the mayor of Igaras be court martialed.²⁰⁶ The communications concerning the investigations and charges indicate the seriousness with which the War Department took the allegations, including the allegations of water torture:

It is believed that the violations of law and humanity, of which these cases, if true, are examples, will prove to be few and occasional and not to characterize the conduct of the army generally in the Philippines; but the fact that any such acts of cruelty and barbarity appear to have been done indicates the necessity of a most thorough, searching, and exhaustive investigation under the general charges preferred by Governor Gardener, and you will spare no effort, in the investigation already ordered under these charges, to uncover every such case which may have occurred and bring the offenders to justice.²⁰⁷

That the water cure is torture continued to be our national position through the aftermath of World War II. The International Military Tribunal for the Far East described the “water treatment” in familiar terms:

The so-called “water treatment” was commonly applied. The victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then

instructions.”); Prevost, *supra* note 170, at 14 (“Applying General Order 100 . . . the US clearly determined in 1902 that the use of the water cure was unlawful.”).

204. *Lodge Committee Hearings, supra* note 6, at 2860. Colonel Wagner endorsed the statement that “the infliction of any character of torture for the purpose of extorting confessions is a violation of the express rules of war.” *Id.* at 2869.

205. *Id.* at 1548.

206. *Id.* at 1549 (Letter from Major-General H. C. Corbin, Adjutant-General to Major-General Chaffee in the Philippines).

207. *Id.*

applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was to revive the victim and successively repeat the process.²⁰⁸

Grouped together with burning, electric shocks, and flogging, the Tribunal found the water treatment constituted torture.²⁰⁹

If the water cure was widely used by American soldiers in the Philippine-American War, and if its use violated the Lieber code, it is fair to ask what was the Army's record of prosecution.

On February 17, 1902, Secretary Root forwarded to the Lodge Committee "a memorandum of 44 officers, soldiers, and camp followers who have been tried, and 39 of them convicted, for violation of [orders implementing the Lieber code]."²¹⁰ The compilation submitted by Secretary Root has been misinterpreted. One writer, for example, referred to "the [thirty-nine] Americans convicted for crimes of torturing and shooting prisoners,"²¹¹ another to "forty-four cases of cruelty that had been prosecuted in military courts."²¹² In fact, all but four of the cases cited by Secretary Root were simply the legal flotsam of an occupying army, unrelated to the torture or killing of prisoners.²¹³ Fourteen of the cases involved looting and robbery.²¹⁴ Twelve of the cited cases involve improper relations with Filipino women, rape, and attempted rape.²¹⁵ Fifteen involve assaults on Filipinos or the

208. INTERNATIONAL MILITARY TRIBUNAL, *supra* note 141, at 516.

209. *Id.* at 516 ("The practice of torturing prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops, both in the occupied territories and in Japan Among these tortures were the water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging.")

210. *Lodge Committee Hearings*, *supra* note 6, at 950. Actually, the listing attached to Secretary Root's letter contains forty-six individuals, not forty-four, and indicates forty-two convictions, not thirty-nine.

211. Oswald, *supra* note 61, at 11.

212. JONES, *supra* note 8, at 274.

213. EINOLF, *supra* note 64, at 39 ("[I]ndividual soldiers abused civilians, committing crimes typical of an occupying army: stealing pigs and chickens to eat, not paying storekeepers, and getting into drunken brawls.")

214. Three officers were convicted of looting, robbery, or pillaging. *Lodge Committee Hearings*, *supra* note 6, at 990 (Second Lieutenant Wm. M. Capp for "[f]iring into town, and looting," for which he received a reprimand; Second Lieutenant Francis J. Ellison for "[l]ooting and encouraging same," for which he received a reprimand; Captain Isiah H. Baker for "[p]ermitted looting," for which he received a reprimand which was set aside by the reviewing authority as irregular). Two officers were acquitted of charges of looting, robbing or pillaging. *Id.* at 990, 992 (Captain John B. Jeffery acquitted on charge of "[q]uitting post to pillage" and First Lieutenant A.F. Fisk acquitted on charge of "[p]ermitted pillage"). Nine enlisted men were convicted of looting, robbing or pillaging. *Id.* at 990-92 (John H. Adams for "robbery" for which he received a dishonorable discharge and six months in prison; Jas. Henderson for "[r]obbery and terrorizing natives" for which he received a dishonorable discharge and one month in prison; Clarence R. Moore for "[l]ooting" for which he received a fine of \$30 and three months in prison; Bruce O. Walsh for "[r]obbery from person" for which he received a dishonorable discharge and three years in prison; and Jay J. Poffenholtz for "[c]hoking and robbing native woman" for which he received a dishonorable discharge and five years in prison; Iden L. Gugit for "[r]obbery" for which he received a dishonorable discharge and three years in prison; A. Dobby for "[l]ooting" for which he received a fine of \$10 and two months in prison; John S. Anderson for "[l]ooting" for which he received a dishonorable discharge and one year in prison; Alvin S. Grosz for "[l]ooting from church" for which he received a dishonorable discharge and three years in prison).

215. One officer was acquitted of a charge involving improper relations, rape or attempted rape. *Id.* at 992 (Second Lieutenant James M. Dickerson was acquitted on charge of "[i]mproper relations with native

murder of Filipinos.²¹⁶ One case defies narrow classification: civilian George A. Raymond was charged with “murder, rape, robbery and general outlawry.”²¹⁷

Only four of the cases cited by Secretary Root involved the torture or death of prisoners. Lieutenant Bissell Thomas was convicted of assaulting prisoners and cruelty by beating prisoners in his charge. He was fined \$300 and reprimanded. The reviewing authority remarked that the punishment inflicted by Lieutenant Thomas was “very severe and amounted almost to acute torture,” and commented that his actions “can not be too much deplored nor too emphatically denounced.”²¹⁸ Captain George W. Brandle and Second Lieutenant Alvin S. Perkins were convicted of torture because they had Filipinos hanged by the neck for brief periods to force them to confess.²¹⁹ They were both reprimanded.²²⁰ First Lieutenant Preston Brown was convicted of killing a prisoner of war.²²¹ He was dismissed from the Army and sentenced to five years at hard labor.²²²

women”). Eleven enlisted men, civilians, and Filipino scouts were convicted of charges involving improper relations, rape, or attempted rape. *Id.* at 991-92 (Private Wm. E. Soarborough for “[r]ape,” for which he received a death sentence that was commuted to twenty years in prison; Private Otto R. Conine for “[r]ape,” for which he received a death sentence that was commuted to twenty years in prison; Corporal Geo. Danphoffer for “[r]ape,” for which he received a dishonorable discharge and life in prison that was commuted to twenty years in prison; Private Peter McBennett for “[r]ape,” for which he received a death sentence that was commuted to twenty years in prison; Private William Victor for “[r]ape of a 14-year-old native girl,” for which he received a dishonorable discharge and twenty years in prison; Civilian William Harvey for “[r]aping native [sixty] years old,” for which he received ten years in prison; Civilian Robert Porter for “[r]ape and other assault,” for which he received a death sentence that was commuted to twenty years in prison; Filipino scout Segundo Arcella for “[r]ape and abduction,” for which he was sentenced to be hanged; Frank Miller for “[r]ape,” for which he received a death sentence that was commuted to twenty years in prison; Thomas Walsh for “[a]ssault, intent to rape,” for which he received a \$45 fine and five months in prison; Arthur B. Butler for “[a]ssault, intent to rape,” for which he received a \$45 fine and five months in prison).

216. Fifteen enlisted men, civilians and Filipino scouts were convicted of assaults on or murders of Filipinos. *Id.* at 990-92 (Walter Turnbull, Jr., for “[a]ssaulting native woman with bayonet,” for which he received a dishonorable discharge and three years in prison; John Ryan for “[w]ounding native on head with heavy bottle,” for which he received a \$120 fine; Joseph J. Faust for “[k]icking native woman in face,” for which he received a \$60 fine; Private Phineas Foutz for “[k]illing native girl by stabbing,” for which he received a death sentence; Private Edward M. Brodie for “[w]antonly killed a native boy,” for which he received a dishonorable discharge and life in prison; Private Jas. F. Coffey for “[w]antonly killed a native boy,” for which he received a dishonorable discharge and life in prison; Musician Julius Arnold for “[i]nsulting and killing native woman,” for which he received a dishonorable discharge and life in prison; William Clay for “[a]ssault and battery on native woman,” for which he received a dishonorable discharge and one year in prison; Henry Bruce for “[a]ssault on natives, including a young girl,” for which he received a \$20 fine and two months in prison; Civilian Harry Cline for “[m]urder and assault with intent to kill,” for which he received a death sentence; Filipino scout Pasquinto de Leon for “[m]urder, communicating with and relieving enemy,” for which he was sentenced to be hanged; Private John Allen for “[m]urder,” for which he received a dishonorable discharge and twenty years in prison; Willie Wilson for “[m]urder,” for which he received a death sentence that was commuted to thirty years in prison; Thos. E. Lewis for “[a]ssault,” for which he received one month in prison; William Whitehead for “[a]ssault with knife with intent to kill,” for which he received a dishonorable discharge and five years in prison).

217. *Id.* at 991 (Raymond was sentenced to death).

218. *Id.* at 990.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

Not a single case cited by Secretary Root involved the water cure, although eleven of the witnesses before the Lodge Committee testified as to episodes of water torture that predated the Secretary's communication,²²³ and Professor Einoff's analysis suggests that by February of 1902, when Secretary Root sent his letter, the use of water torture was already widespread and frequent.

Over the course of its hearings, the Lodge Committee developed information about water torture that caused President Roosevelt and Secretary Root to act. On April 16, 1902, General Corbin of the Adjutant-General's Office telegraphed General Chaffee in Manila:

Yesterday, before Senate Committee on Philippines, Sergt. Charles S. Riley and Private William Lewis Smith, of the Twenty-[S]ixth Volunteer Infantry, testified that the form of torture known as the "water cure" was administered to the president of the town of Igbarras, Iloilo Province, Panay, by a detachment of the Eighteenth Regiment U.S. Infantry, under command Lieut. Arthur L. Conger, under orders of Maj. Edwin F. Glenn, then captain, Twenty-[F]ifty Regiment U.S. Infantry, and that Capt. and Asst. Surg. Palmer Lyon, at that time a contract surgeon, was present to assist them. The officers named, or such of them as are found to be responsible for the act, will be tried therefor by court-martial.²²⁴

Speaking on behalf of President Roosevelt and Secretary Root—and noting the "great . . . provocation" to which the Army had been subjected—General Corbin declared that "nothing can justify or will be held to justify the use of torture or inhuman conduct of any kind on the part of the American Army."²²⁵ There was no question but that the impetus for investigation and prosecution came from the President:

The President desires to know in the fullest and most circumstantial manner all the facts, nothing being concealed and no man being for any reason favored or shielded. For the very reason that the President intends to back up the army in the heartiest fashion in every lawful and legitimate method of doing its work, he also intends to see that the most rigorous care is exercised to detect and prevent any cruelty or brutality, and that men guilty thereof are punished.²²⁶

Toward that end, the President and the Secretary of War ordered a sweeping investigation and program of prosecution:

It is believed the violations of law and humanity, of which these cases, if true, are examples, will prove to be few and occasional and not to characterize the conduct of the army generally in the Philippine Islands, but the fact that any such acts of cruelty and barbarity appear to have been done indicates necessity of most thorough and searching and exhaustive investigation . . . and you will spare no effort in the investigation already ordered under these charges to uncover every such case which

223. Ten witnesses testified as to water torture episodes in 1900. *Id.* at 2881-85, 2889 (early 1900), 1765-75 (May, 1900), 2061-63 (Aug. of 1900), 2251 *et. seq.* (Aug. 20, 1900), 1969-72 (Aug. 21 and 23, 1900), 1727-28 *et. seq.* (Nov. 27, 1900), 2752-54 (Nov. 27, 1900), 2544 *et. seq.* (Nov. 27, 1900), 1528-31 (Nov. 27, 1900), and 1538-41 (Nov. 27, 1900). One witness testified to a water torture episode in 1901. *Id.* at 2236-37 (Sept. 26, 1901).

224. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1328 (cable of Apr. 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee).

225. *Id.*

226. *Id.*

may have occurred and bring the offenders to justice.²²⁷

Thus, although the committee would continue for another seventy-three days, the stage was set for a shift from investigation by the Lodge Committee to investigation and prosecution by the Army.

The ten cases discussed below are a selection of water torture cases from the Philippine-American War. Included are four court-martial cases that were prosecuted, two to convictions,²²⁸ and two to acquittals.²²⁹ Also included are three cases that seemingly would have been prosecuted but for various procedural barriers.²³⁰ The final three cases are situations where the Army appeared to have had sufficient evidence to go forward, where there were no apparent procedural barriers, but where nevertheless no prosecutions occurred.²³¹

The ten cases are those for which information is available beyond merely an alleged perpetrator's name; for example, those for which there is an admission under oath or at least a rudimentary investigation. Five of the ten cases—involving Lieutenants Gaujot and Hickman, Captains Ryan and Brownell, and Major Glenn—were identified in Secretary Root's 1903 report to the Lodge Committee in response to the Senate's request for information on courts-martial in the Philippines.²³² These are all of the cases cited in Secretary Root's 1903 report which involved water torture.²³³ The remaining five of the ten—Sergeant Manning; Lieutenants Conger,

227. *Id.*

228. Major Edwin F. Glenn, *see infra* Part III(A); Lieutenant Julien E. Gaujot, *see infra* Part III(C).

229. Captain James A. Ryan, *see infra* Part III(D); Lieutenant Edwin E. Hickman, *see infra* Part III(G).

230. Captain Cornelius M. Brownell, *see infra* Part III(E); Captain Samuels, *see infra* Part III(I); Lieutenant L. W. Caffey, *see infra* Part III(J).

231. Lieutenant Arthur L. Conger, *see infra* Part III(B); Lieutenant Frederick B. Hennessy, *see infra* Part III(F); Sergeant Januarius Manning, *see infra* Part III(H). An eleventh case is not included. Lieutenant William S. Sinclair was accused of the water torture of another American soldier, Private Edward C. Richter, resulting in death. *Cruelty in Philippines*, *supra* note 178 (the deceased is variously listed as "Edward C. Richter" and "Edward R. Richter"). In his review, Judge Advocate General George B. Davis characterizes Richer as "the unfortunate young soldier, who was gagged given the water cure, and finally suffocated to death . . ." *Id.* The anti-imperialist press portrayed the circumstances surrounding Private Richter's death in terms that echoed the water cure. *Mrs. Richter and the President*, *supra* note 96. The counter-narrative, however, was that Private Richter was simply drunk and disorderly: "Richter was boisterous and violent and intoxicated, calling Lieutenant Sinclair vile names. As he resisted arrest and attempted to kick the sergeant, he was tied, and as his profane language continued, cold water was dashed into his face for a period of about three minutes." *American Soldier Dies Under "Cure": Report on Case of Private Richter Who Died Under Punishment*, SAN FRANCISCO CALL, May 9, 1902. The claim was that the Private suffocated on his own vomit. EINOLF, *supra* note 64, at 121. Lieutenant Sinclair was found not guilty. General Chaffee wrote the Adjutant-General in Washington after Sinclair's trial in terms that do not indicate disapproval. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1326 (cable of Apr. 10, 1902, from Major-General Adna Chaffee to Major-General H.C. Corbin). The Judge Advocate General found that Lieutenant Sinclair's court-martial was regular and he could not be tried again. *Cruelty in Philippines*, *supra* note 178.

232. *Secretary of War Report of March, 1903*, *supra* note 7, at 1. First Lieutenants Gaujot and Hickman, Captains Ryan and Brownell, and Major Glenn, were included for water torture of prisoners. *Id.* at 28-30, 33-43, 62-71, 78-150, 17-28.

233. The other six individuals mentioned in the 1903 Root report to the Lodge Committee were cited for other types of potential charges. First Lieutenants Norman Cook, John H. A. Day, Preston Brown, and Major Littleton W. T. Waller were included for the murder of prisoners. *Secretary of War Report of March, 1903*, *supra* note 7, at 30-33, 46-48, 48-62, 43-46. First Lieutenant William S. Sinclair was

Hennessy, Caffey; and Captain Samuels—are identified in Professor Einolf’s analysis.²³⁴ One of the first group of five—Major Glenn—and two of the second group of five—Sergeant Manning and Lieutenant Conger—are also mentioned repeatedly in testimony about water torture before the Lodge Committee.²³⁵

A. Major Edwin F. Glenn

The most important water-torture court-martial of the Philippine-American War was that of Major Edwin F. Glenn.²³⁶ The essential facts upon which Major Glenn was charged were both simple and not in dispute. On November 27, 1900, soldiers acting under then-Captain Glenn’s direction, seeking information about nationalist forces, subjected Joviano Ealdama, the mayor of Igaras, to the water cure. Glenn “acknowledged the act, but justified it on the ground that he wanted the information possessed by the Presidente, and which he obtained by the water cure application.”²³⁷

The importance of the Glenn court-martial came in large part from the activities for which he was not charged. Major Edwin Glenn engaged in water torture far beyond that for which he was charged.²³⁸ He was a central figure in the history of water torture in the Philippines; one of the developers of the technique, and one of its central practitioners.²³⁹ Major Glenn is credited with being a mobile practitioner of torture:

In 1900 and early 1901, while serving as the judge advocate, Glenn orchestrated a systematic campaign of arrests and torture. In the Philippine islands of Leyte and Samar, he led a mobile team of crack water cure experts who arrested community leaders (some called it kidnapping) to extract information about the insurgency. General Nelson Miles . . . reported privately to Secretary of War Root that Glenn and his team had become notorious for moving around the islands and arresting men “for the purposes of extorting statements by means of torture.” Glenn soon became so well known as the chief administrator of torture in the Philippines that the torture squad was called “Glenn’s Brigade.”²⁴⁰

included for Richter case. *Id.* at 71-78. General Jacob H. Smith was included for the “howling wilderness order.” *Id.* at 2-17.

234. EINOLF, *supra* note 64, at 69-70, 178 (Sergeant Manning), 68, 70-73, 122, 124-25 (Lieutenant Conger), 84-85, 156, 165-66 (Lieutenant Hennessy), 166-67 (Lieutenant Caffey), 73, 162 (Captain Samuels).

235. *Lodge Committee Hearings*, *supra* note 6, at 1529-30, 1531, 1539-40, 1727-28, 2243, 2249, 2777-78 (Major Glenn), 1969-71, 2252-53 (Sergeant Manning), 1529-30, 1539-40, 2243, 2784-85, and 2898-2900 (Lieutenant Conger).

236. Oswald, *supra* note 61, at 13; WITT, *supra* note 34, at 359 (“The most prominent [of the trials of accused American torturers] was that of Major Edwin F. Glenn . . .”).

237. *Defended the Water Cure*, N.Y. TIMES, July 26, 1902.

238. BARNETT, *supra* note 7, at 91.

239. EINOLF, *supra* note 64, at 1 (“Glenn was the chief military lawyer and intelligence officer on the islands of Samar and Panay, and he had personally commanded an elite mounted intelligence squad. Glenn’s squad went from town to town, arresting suspected guerrillas or guerrilla supporters, and giving them the ‘water cure’ to make them talk.”); *id.* at 61 (“On Panay, Major Edwin F. Glenn . . . refined the use of torture and turned it into a standard operating procedure.”).

240. WITT, *supra* note 34, at 359; JONES, *supra* note 8, at 244; *Gen. Miles’s Report*, *supra* note 63 (“It appears that Major Glenn, Lieut. Conger, and a party of assistants and native scouts were moved from place to place for the purpose of extorting statements by means of torture, and it became so notorious that this party was called ‘Glenn’s brigade.’”).

The proceedings of the Lodge Committee contain numerous references to Major Glenn. Nine witnesses named him in connection with the water torture of Filipinos or the burning of villages.²⁴¹ These mentions before the Lodge Committee caused the War Department to direct on April 15, 1902, that Major Glenn be relieved from active duty and made available for investigation and possible court martial.²⁴² Glenn was one of three officers court-martialed “[b]y direction of the President” on “charges of cruelty and barbarity brought against the army in connection with the Samar campaign.”²⁴³

It must have been clear at the time that the venue of Major Glenn’s court-martial would be a factor in the ability of the Army to charge him appropriately, secure a conviction, and impose a sentence commensurate with his actions. Glenn had great support among the military and the American civilian population of the Philippines.²⁴⁴ Part of that support undoubtedly came from a feeling that the American soldiers operating in the Philippines were faced with a difficult situation that was not fully understood by those not involved in the fight. For example, General Chaffee suggested an extenuating circumstances defense that could not be understood by anyone who was not there:

Sorely impossible convey in words correct idea difficulties been met with by officers in prosecution this war, nor can President fully comprehend that very much necessary success would have failed of accomplishment had not serious measures been used force disclosure information. Some officers have doubtless failed in exercise due discretion, blood grown hot in their dealings with deceit and lying, hence severity some few occasions. This regretted.²⁴⁵

At roughly the same time, the *New York Times* editorialized in favor of trying the water torture cases in the Philippines, quoting at length and with approval from a *Harper’s Weekly* editorial. The piece starts by in effect blaming the Filipinos for our conduct:

241. *Lodge Committee Hearings*, *supra* note 6, at 1527-31, 1536 (Charles S. Riley about water cure of Igaras mayor and burning of Igaras); 1538-42, 1545 (William Lewis Smith about water cure of Igaras mayor and burning of Igaras); 1726-31, 1734-35 (Edward J. Davis about water cure of Igaras mayor and burning of Igaras); 1969-71, 1976-77, 1979 (Leroy E. Hallock about water cure of native at Leon in connection with death of soldier O’Hearn); 2243-44, 2249 (Isadore H. Dube about water cure of native at Jaro, Panay, and confinement of woman in with men); 2258 (Januarius Manning about soldiers learning how to administer water cure from being out with Glenn); 2545, 2572, 2578 (Richard T. O’Brien about violation of woman at burning of Igaras); 2767, 2776-78, 2780, 2784 (Fred McDonald about water cure of Igaras mayor and burning of Igaras); 2898 (Seward J. Norton about administration of water cure).

242. *Id.* at 1548-1549 (letter of Apr. 15, 1902 from the Adjutant-General, Major-General H.C. Corbin to General Adna Chaffee). Colonel Oswald credits Secretary Root’s direction to relieve and court-martial Glenn as being “[i]n response to testimony before the Senate committee regarding Major Glenn’s generous use of the water cure . . .”. Oswald, *supra* note 61, at 11.

243. EINOLF, *supra* note 64, at 1 (“President Roosevelt and Secretary of War Elihu Root had personally ordered Glenn’s court-martial.”); *Another Court-Martial: Appointed to Try Major Edwin F. Glenn, Fifth Infantry, and Other Persons*, N.Y. TIMES, May 2, 1902. Igaras is on Panay, not Samar, and that the water torture of Joveniano Ealdama occurred ten months before the incident at Balangiga.

244. Kramer, *supra* note 7 (“Most significant . . . was the decision, possibly at Glenn’s request, to shift the location of the court-martial from San Francisco to Catbalogan, in the Philippines, close to sympathetic officers fighting a war, and an ocean away from the accusing witnesses, whose units had returned home.”).

245. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, V. 2, at 1329 (cable of April 19, 1902, from Major-General Adna Chaffee to Major-General H.C. Corbin).

A choice of cruelties is the best that has been offered in the Philippines. It is not so certain that we at home can afford to shudder at the water cure unless we disown the whole job, and if we do disown the whole job we cannot put the responsibility for it on the army. The army has obeyed orders. It was sent to the Philippines to subdue the Filipinos, and it seems to have made remarkable progress. Having the devil to fight, it has sometimes used fire; having liars to fight, it has sometimes used lies; having semi-civilized men to fight, it has in some instances used semi-civilized methods. That was inevitable, and will be inevitable as long as soldiers are men.²⁴⁶

The piece then shifts to consideration of where the water torture cases ought be tried. The author makes an argument sounding in military necessity for trying the cases in the Philippines:

If these water-cure cases are brought to trial they should be tried in the Philippines, before men who are familiar with the circumstances of their occurrence and the general conditions and standards of conduct that obtained where they happened. None of us believes that cruelty runs in the American blood, or that wanton cruelty has been done in the Philippines, except in isolated cases, but the American soldier is an earnest man, and wants results.²⁴⁷

The original decision, made by Secretary Root and conveyed to General Chaffee on April 16, 1902, was that Major Glenn be returned to the United States for trial:

Twenty-[S]ixth Volunteer Infantry and Eighteenth Regiment U.S. Infantry having returned to United States, and most of the witnesses being presumptively here, Secretary of War directs Maj. Edwin F. Glenn be directed proceed to San Francisco . . . with a view to his trial by court-martial under charges alleging the cruelties practiced by him upon a native of the Philippine Islands at Igbarras June 27, 1900.²⁴⁸

In the same communication, it was provided that any witnesses remaining in the Philippines would be sent to San Francisco for Major Glenn's trial.²⁴⁹

In terms that foreshadowed a military necessity defense, Major Glenn objected to being tried in San Francisco and was able to enlist General Chaffee to advocate for the trial being held in the Philippines:

[General Chaffee] added that his orders were to prefer charges against me and bring me to trial . . . I stated to him that I thought it would be an injustice to me to send me to the town of San Francisco, in the United States, to be tried there for an alleged offense committed in the Philippine Islands, for two reasons:

First. Because of the then high state of excitement in the United States upon the subject of the so-called water cure and the consequent misunderstanding of what was meant by that term, and for the additional reason that any court organized in the United States from the officers there would be absolutely unprepared to pass upon

246. *Topics of the Times*, N.Y. TIMES, May 2, 1902.

247. *Id.*

248. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, V. 2, at 1328 (cable of Apr. 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee); Borch, *supra* note 11, at 14.

249. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, V. 2, at 1328 (cable of Apr. 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee) ("If you can discover any witnesses still in the service in the Philippine Islands who can testify in support of the charges, or if Major Glenn desires attendance of any persons now serving in the islands as witnesses for defense, direct them proceed to San Francisco for that purpose.").

any question involving so important a point as the action of officers in the field in the Philippine Islands.

This he told me was fair and he would ask for a court here.²⁵⁰

Within three days of being ordered to send Glenn to San Francisco for trial, General Chaffee responded to Washington, suggesting that Major Glenn be tried in the Philippines and not in San Francisco:

[I]nquiry into Waller case disclosed inference that presidente of Basey and two native prisoners had been shot through influence, direction, or knowledge Major Glenn and Lieutenant Cook, Philippine Scouts; that padre of Basey had been improperly treated by direction or knowledge of Major Glenn. Major Watts instructed ascertain fact. His report recently received (and) examined by me yesterday shows necessity trial Lieutenant Cook for murder [and] Lieutenant Gaujot for water cure of three padres. Probability both cases may involve Glenn to extent that officers acted according to his instructions. Glenn should not therefore be ordered San Francisco. He can be charged with directing application water cure to president Igbarras as stated in your cable.²⁵¹

After a nine-day delay Washington agreed to try Major Glenn in the Philippines, and to try him at Catbalogan, on Samar, some four-hundred fifty miles removed from Manila.²⁵²

Having Glenn court-martial at Catbalogan on Samar was not the result of a policy that court-martials be held where the events leading to the charges occurred. The sole act upon which Major Glenn was charged, the water torture of Mayor Joveniano Ealdama, took place at Igbarras, which is on Panay, not Samar. And the court-martial of General Jacob H. Smith, which did revolve around his order to turn Samar into a howling wilderness, took place at Manila, on Luzon, not at a location on Samar.²⁵³

Having successfully sought a favorable venue, Major Glenn was court-martialed from May 23 to May 29, 1902, at Catbalogan.²⁵⁴ At trial, he submitted a statement to the court he admitted having caused Joveniano Ealdama to be given the water cure:

The defendant is prepared to admit . . . that he did order and direct, and by his presence and authority did cause an officer and soldiers subject to his command to execute upon the said Tobeniano Ealdama a method of punishment commonly known in the Philippine Islands as the "water cure" – that is, did cause water to be introduced into his mouth and stomach, and that this was at the pueblo of Igbarras, Panay, on or about November 27, 1900.²⁵⁵

According to Major Glenn, his intention was not to contest the factual

250. *Secretary of War Report of March, 1903*, *supra* note 7, at 21; JONES, *supra* note 8, at 327.

251. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, V. 2, at 1329 (cable of Apr. 19, 1902, from Major-General Adna Chaffee to Major-General H.C. Corbin).

252. *Id.* at 1333 (cable of Apr. 28, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee). The ranking officer on the court-martial was Brigadier General Frederick Dent Grant, the son of President Ulysses S. Grant.

253. *Id.* at 1329 (Special Orders, No. 1, Apr. 21, 1902).

254. *Secretary of War Report of March, 1903*, *supra* note 7, at 20.

255. *Id.* at 20-21.

allegations, but only to contest the characterization of his actions as illegal.²⁵⁶

The prosecution produced Joveniano Ealdama from prison to testify. He confirmed the Lodge Committee testimony of the witnesses, noted that he had been tortured with salty water, and stated that he had been afraid for his life during the procedure:

The court: Were you afraid at any time that giving you water would kill you?
Ealdama: I thought I was going to die.
The court: What reason did you have for thinking you were going to die?
Ealdama: I had pain in my body and I could not breathe; also the bitterness.
The court: Have you been injured in health by the water given you that day?
Ealdama: I was sick a week in the prison at Iloilo.²⁵⁷

Major Glenn's testimony differed from that of his victim:

Glenn: As stated, he was taken to this tank, the spigot of which, to the best of my judgment, was about 10 inches above the floor, allowing 4 to 6 inches to his face. The water was turned on in a small stream, so as to drop on his upper lip. He was told that he must tell us, and that as soon as he gave any sign that he wished to say anything this was stopped. He was not abused personally in any way, and this was the only punishment that was administered to him as I could see.
Q: Was anything like force used in inserting water into the mouth?
Glenn: Not at all; it was given exactly as stated to you; if he opened his mouth it was run into his mouth, and if not it simply played upon his upper lip. He could move his head from right to left.²⁵⁸

Joveniano Ealdama's testimony spoke to the reliability of information given under torture:

They kept putting the water in, and putting it in, and asking me if I was in communication with the insurrectos, and afterwards the interpreter told me to say yes, that I was in communication with the insurrectos. I did as the interpreter told me – I answered yes. I thought that I would die, because I had pains in my stomach. They said, tell about how many you saw – insurrectos. I told them 200, and they said, "No; it's a lie," and gave me more water. It was quite a lot of Americans there, and I told them 200. They said it was a lie, and gave me more water. Then I said 100. They told me no. Then I said 50, and they told me no. Then the captain said, "[v]ery well, let him up."²⁵⁹

General Davis's conclusion was: "Some of the admissions extorted from Ealdama, were obviously made with a view to terminate the treatment to which he was being subjected; others were made at the suggestion of the interpreter and for a similar purpose."²⁶⁰

Major Glenn was charged with conduct prejudicial to good order and military

256. *Id.* at 21 ("I have admitted and do admit everything in that specification except the word 'unlawfully.'").

257. *Id.* at 23.

258. *Id.*

259. *Id.* at 22.

260. *Id.* at 25.

discipline, not with a violation of Rule 16 of the Lieber Code.²⁶¹ He was found guilty on the specification and the charge and sentenced: “To be suspended from command for the period of one month, and to forfeit the sum fifty dollars for the same period.”²⁶² The court explained that it was “thus lenient on account of the circumstances as shown in evidence.”²⁶³

Although review by the Judge-Advocate-General in such a case was not automatic, General Davis reviewed the Glenn proceedings.²⁶⁴ As characterized by Judge-Advocate-General Davis, Glenn’s defense was not as to the facts, but solely as to the law, and was essentially two-fold:

The accused admitted the facts in connection with administration of the water cure, but undertook to show, in defense, that his act was not unlawful: that is, it was justified by military necessity and was warranted as a legitimate exercise of force by the laws of war.²⁶⁵

As to the defense based on the conduct of the opposition forces, Major Glenn’s theory was straightforward:

I found very soon after my arrival in Panay that every man’s hand was against us; that every man, woman, and child in the islands was an enemy, and in my best judgment they are to-day, and always will be. Practically every Presidente and other official has been playing double. They organized and were active members of secret societies, known as Katipunán, &c., whose avowed objects were to advance the cause of ‘independencia,’ in any and all ways, and under this high-sounding phrase they have made use of every means forbidden to them by the laws of war.

These men of peace have actually waged war by killing straggling American soldiers. They have made use of poison in the drinks sold to America soldiers. They have poisoned their arrows and the tips of their spears and bolos, together with the bamboo tips placed in the deadly traps that abounded on the trails.

I am convinced that my action resulted in hastening the termination of hostilities and directly resulted in saving many human lives, and directly injured no one.²⁶⁶

General Davis reported that the prosecutor “resolutely opposed” admission of the testimony concerning the actions of the opposition forces. He noted that Ealdama was in fact tried and convicted by a military commission. His conclusion decisively rejected the defense based on the actions of the opposition:

The troops were operating in detachments against isolated bands or bodies of insurgents, all of which were acting as guerrillas and were conducting their operations in flagrant disregard of the rules of civilized war. The situation thus presented was difficult and to the last degree exasperating, but it did not relieve the

261. *Id.* at 20. There is some confusion on this point, with one author stating that “the court found Glenn guilty of violating the laws of war.” JONES, *supra* note 8, at 328.

262. GENERAL ORDERS AND CIRCULARS, ADJUTANT GENERAL’S OFFICE, 1902 (Washington, 1903), at 564-65 (HEADQUARTERS OF THE ARMY, GENERAL ORDERS, NO. 87., ADJUTANT GENERAL’S OFFICE, Washington July 26, 1902).

263. *Id.*

264. Borch, *supra* note 11, at 19 n.31.

265. *Secretary of War Report of March, 1903, supra* note 7, at 25; WITT, *supra* note 34, at 359 (“His actions, he claimed, were justified by military necessity.”).

266. *Defended the Water Cure, supra* note 237.

officers and men of the occupying forces of their obligation to adhere to the rules of war in the efforts put forth by them with a view to suppress the insurrection and restore public order.²⁶⁷

The day before Major Glenn's court-martial convened, Senator Hoar took to the Senate floor and addressed such a defense:

But who ever heard before of an American gentleman, or an American, who took as a rule for his own conduct the conduct of his antagonist, or who claimed that the Republic should act as savages because she had savages to deal with? I had supposed, Mr. President, that the question, whether a gentleman shall lie or murder or torture, depended on his sense of his own character, and not on the opinion of his victim. Of all the miserable sophistical shifts which have attended this wretched business from the beginning, there is none more miserable than this.²⁶⁸

As to Major Glenn's military necessity defense, General Davis was unfortunately ambiguous. The problem was not that General Davis thought Major Glenn's military necessity defense was meritorious. Rather, the problem was the way in which General Davis framed the analysis. Although General Davis referred to Rule 16 of the Lieber code, under which military necessity was not a defense, he did not end the inquiry there. Rather, he acted as though the military necessity defense required a review of the facts of the case, thus at least implicitly conceding that there might have existed facts that would have rendered successful the military necessity defense in the Glenn case:

As to the defense that the administration of the water cure was warranted by military necessity, it will be necessary to examine the circumstances attending the punishment in question and to determine from the facts the nature and character of the emergency.²⁶⁹

Having reviewed the information Major Glenn sought to extort through the water torture of Joveniano Ealdama, General Davis concluded on the facts that no emergency existed suitable to invoke the military necessity defense:

The offense of the accused consisted in a resort to torture with a view to extort a confession. The question is, did an emergency exist, so instant and important as to justify the disobedience of the plain requirements of [the Lieber code]? I think not.²⁷⁰

Compounding the error, General Davis continued by affirming the existence of a military necessity defense in a different situation:

A rare or isolated case can be conceived of in which the movement of an army or a military operation of importance may depend upon obtaining the unwilling service of an inhabitant of the enemy's country in the capacity of guide; such did occur, indeed during the civil war. In such a case a similar resort to force may be justified as a measure of emergency, but no such case existed in the vicinity of Igbarras at

267. *Secretary of War Report of March, 1903*, *supra* note 7, at 27.

268. Subjugation, *supra* note 44.

269. *Secretary of War Report of March, 1903*, *supra* note 7, at 26.

270. *Id.*

the date of the specifications.²⁷¹

But the process of impressing guides was covered by rules in the Lieber code other than Rule 16, which pertained to “the infliction of . . . torture to extort confessions.”²⁷² Rule 93 provided: “All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.”²⁷³ Such guides could have been executed if they intentionally misled the army.²⁷⁴ And the extortion of information from such guides would have come under Rule 80: “Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners, in order to extort the desired information, or to punish them for having given false information.”²⁷⁵ The difference between Rule 16 and Rule 80 was that the language of Rule 16 specifically precluded a defense of military necessity, while the language of Rule 80 was silent on the subject and thus presumably gave way to the general military necessity rule under Rules 14 and 15.²⁷⁶

Davis’s error could be seen as opening the door for a military necessity defense to charges under Rule 16 of the Lieber code.²⁷⁷ One can imagine three counter arguments that might have been advanced to remediate General Davis’s error. First, it could have been asserted that General Davis was simply, if inartfully, arguing in the alternative. He cited Rule 16, which contained the exclusion of military necessity and then did the military necessity analysis to prove that even if military necessity were allowed as a defense to a Rule 16 charge—and it was not—it would not have availed Major Glenn since the factual predicate was absent. Second, it could have been noted that Major Glenn was not charged under Rule 16; he was charged with “conduct prejudicial to good order and military discipline.”²⁷⁸ As presumably a military necessity defense would have been available to the lesser charge, it was appropriate of General Davis to review the facts. Finally, it could have been argued that General Davis’s error was confined to the Glenn case; that he had neither the actual nor the apparent authority to change the law to allow a military necessity

271. *Id.* at 26-27.

272. Lieber code, *supra* note 189, Rule 16.

273. *Id.*, Rule 93.

274. *Id.*, Rule 97.

275. *Id.*, Rule 80.

276. *Compare id.*, Rule 16, with *id.*, Rule 80.

277. WITT, *supra* note 34, at 360-61 (“Davis’s reasoning contained a surprising caveat. Lincoln’s 1863 instructions had set torture outside the realm of necessity; it was never permitted. Davis, however, asked whether an emergency had existed that was ‘so instant and important as to justify the disobedience of the plain requirements of General Orders, No. 100.’ No such necessity had existed sufficient to justify torture, he concluded. But by asking whether torture was permitted under the circumstances, he seemed to have changed the law to allow it in at least some dire situations. Davis . . . opened a door that Lieber had held shut.”).

278. *Secretary of War Report of March, 1903*, *supra* note 7, at 20. The New York Times reported that Major Glenn was being tried on “charges of cruelty and barbarity.” *Another Court-Martial: Appointed to Try Major Edwin F. Glenn, Fifth Infantry, and Other Persons*, N.Y. TIMES, May 2, 1902. In fact, he was not charged with violation of any of the Lieber code provisions applicable to the water cure. Rather, he was charged with the relatively minor offense of conduct prejudicial to good order and military discipline. 1902 General Orders and Circulars, *supra* note 262, at 564-65.

defense as a general matter to charges under Rule 16.²⁷⁹

Beyond rejecting the defense of military necessity, upon review General Davis was outraged at what he considered an inadequate sentence.²⁸⁰ Because General Davis felt the court was too sympathetic to Major Glenn and would not come to a different result upon reconsideration, he declined to recommend that the President withhold his confirmation.²⁸¹ President Roosevelt confirmed the sentence of Major Glenn on July 24, 1902 “without remark.”²⁸²

As one commentator cast it, “the court found Glenn guilty, but barely.”²⁸³ Major Glenn enjoyed widespread support within the military, so much so that one of his champions in the Navy managed to reverse the outcome of the court-martial, at least in his own memory.²⁸⁴ Complicating the historical record, Major Glenn was court-martialed a second time for his conduct in the Philippine-American War, charged—and acquitted—with ordering the murder of seven prisoners.²⁸⁵

What became of Major Glenn following his conviction for the water torture of Mayor Ealdama?²⁸⁶ Major Glenn was allowed to remain in the Army. In 1903 he was posted to the United States, but in 1908 he was returned to the Philippines. In 1913 he was assigned to the War College, a sign that his superiors considered him to have great promise. He was serving on the Mexican border when the United States entered World War I in April of 1917. He was promoted to Brigadier General in May of 1917. The French government awarded him the title Commander of the Legion of Honor. He retired from the Army in 1920 and died in 1926. He is buried

279. WITT, *supra* note 34, at 360 (“by asking whether torture was permitted under the circumstances, he seemed to have change the law to allow it in at least some dire situations.”).

280. Borch, *supra* note 11, at 14; JONES, *supra* note 8, at 347-48.

281. Borch, *supra* note 11, at 14.

282. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1357 (cable of July 28, 1902, from Carter to Major-General Adna Chaffee).

283. Barnett, *supra* note 7, at 95; WITT, *supra* note 34, at 361 (“his sentence amounted to a proverbial slap on the wrist . . .”).

284. YATES STIRLING, REAR ADMIRAL, U.S.N. (RET), SEA DUTY, THE MEMOIRS OF A FIGHTING ADMIRAL 62 (“Major Glenn . . . was court-martialed in Manila on orders from Washington and cleared . . .”). It turns out historical memory is flawed on both sides. In 2006 a prominent newspaper informed its readers that “As early as 1901, a US court martial sentenced Major Edwin Glenn to [ten] years hard labour for subjecting a suspected insurgent in the Philippines to the ‘water cure.’” Mark Tran, *Cheney endorses simulated drowning*, THE GUARDIAN, Oct. 27, 2006.

285. OSWALD, *supra* note 61, at 13; EINOLF, *supra* note 64, at 90. It was alleged that Major Glenn ordered a lieutenant to take prisoners to lead soldiers to a nationalist camp, and to shoot them if they did not. When they did not, the prisoners “were separated into two parties, numbering three and four respectively, and while tied together were all murdered by being shot or bayoneted to death, some being in kneeling position at that time.” *Gen. Miles’s Report*, *supra* note 63 (quoting General Miles). Tried in December of 1902, Glenn was acquitted. The commander in the Philippines, Major General G.W. Davis, withheld his unqualified approval to the finding and acquittal:

[H]is order under the circumstances shows a reckless disregard for human life which the Division Commander’s sense of right and justice, and his conception of law and duty, require him to condemn and reprobate and which prevent him from giving an unqualified approval to the finding and acquittal of the Court.

OSWALD, *supra* note 61, at 37 n.97; JONES, *supra* note 8, at 342.

286. Bill Thayer, *Edwin F. Glenn*, CULLUM’S REGISTER, 2698, http://penelope.uchicago.edu/Thayer/E/Gazetteer/Places/America/United_States/Army/USMA/Cullums_Register/2698*.html (last visited Oct. 8, 2016); K.S. Melvin, *Glenn, Edwin Forbis*, NCPEDIA, <http://ncpedia.org/biography/glenn-edwin-forbis> (last visited Oct. 8, 2016).

in Arlington Cemetery.²⁸⁷

B. Lieutenant Arthur L. Conger

Arthur L. Conger was born in Akron, Ohio in January of 1872. Graduating from Harvard in 1892, he spent two years in seminary studying to be an Episcopalian priest, and then several years at the American Theosophical Society.²⁸⁸ On November 27, 1900, Lieutenant Conger supervised the water torture of Joveniano Ealdama, the Mayor of Igbarras, for which Major Glenn was prosecuted.²⁸⁹

Lieutenant Conger was in Major Glenn's command. He was also identified as having participated in water torture at San Miguel, near Jaro on Panay,²⁹⁰ and was named in communications between the War Department and General Chaffee ordering his court-martial:

[T]he form of water torture known as the "water cure" was administered to the president of the town of Igbarras, Iloilo Province, Panay, by a detachment . . . under command Lieut. Arthur L. Conger The officers named, or such of them as are found to be responsible for the act, will be tried therefor by court-martial.²⁹¹

It was noted that Lieutenant Conger was, by that time, back in the United States, but presumably that was not a bar to prosecution since the initial plan was to return Major Glenn to San Francisco for court-martial.²⁹² Even when it was soon thereafter decided to try Major Glenn in the Philippines, it was assumed that Lieutenant Conger would be returned to the Philippines.²⁹³ In the end, Lieutenant Conger escaped prosecution for his participation in water torture.

Having not been prosecuted for his participation in water torture during the Philippine-American War, Arthur Conger remained in the Army after peace was declared.²⁹⁴ He served as Chief of the Department of Intelligence for the American

287. What became of the Filipino Major Glenn was convicted of torturing? A week following Major Glenn's first court-martial, Ealdama was tried by a military commission at Iloilo on charges of "Being a war traitor" by supporting the opposition, and of "violating the laws of war" by serving as a captain in the opposition forces. Found guilty, he was sentenced to ten years at hard labor. *Secretary of War Report of March, 1903*, *supra* note 7, at 25; WITT, *supra* note 34, at 361. His descendants report that Ealdama was given a ten-year sentence and then sent into exile, never to return to the Philippines. "Don Joveniano was immediately imprisoned [after he was water tortured and Igbarras was burned] . . . but soon after returning to prison from the trial, he was banished to the Marianas Islands, never to see his wife, 1-yr. old baby and their other kids again." Jack Ealdama, April 10, 2012, <https://es-la.facebook.com/IloiloQueenCityoftheSouth/posts/271922956228960>.

288. ALAN E. DONANT, COLONEL ARTHUR L. CONGER 14 (1999).

289. *Lodge Committee Hearings*, *supra* note 6, at 1529-30, 1539-40, 2898 (testimony of Sergeant Charles S. Riley, William Lewis Smith, and Private Seaward J. Norton).

290. *Id.* at 2243 (testimony of Sergeant Dube) ("I brought the native over, and Lieutenant Conger and Captain Glenn and two or three privates . . . administered the water cure to this native . . .").

291. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, V. 2, at 1328 (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee).

292. *Id.*

293. *Id.* at 1329 (cable of April 19, 1902, from Major-General Adna Chaffee to Major-General H.C. Corbin) ("Conger and Lyon, the president, Mr. Riley, and Smith to be cited as witnesses and sent out here . . . if Conger and Lyon be tried they doubtless will be needed witnesses.")

294. DONANT, *supra* note 288, at 8 (stating "Arthur Conger's military career in itself was remarkable," without mentioning his participation in water torture during the Philippine-America War).

Expeditionary Force in France during World War I, and received the Croix de Guerre from the hands of Marshal Petain. Graduating from the Army War College in 1920 he was promoted to the rank of colonel by 1921. Completing his military career as the military attaché to Germany and Switzerland, he retired in 1928. After his retirement, Arthur Conger served as president of the American section of the Theosophical Society and Leader of the Theosophical Society. Arthur L. Conger died in 1951.²⁹⁵

C. Lieutenant Julien E. Gaujot

Julien E. Gaujot was born in Eagle Harbor, Michigan in October of 1874. He attended Virginia Tech but withdrew after a year. Lieutenant Gaujot was “one of [Major] Glenn’s young intelligence operatives.”²⁹⁶ On January 9, 1902, Lieutenant Gaujot caused the water torture, beating, and hanging of Father Nicanor Acebedo, Father Donato Guimbaolibot, and Father Jose Diaznes.²⁹⁷

Lieutenant Gaujot subjected the three priests to the water cure and other brutalities in January of 1902: “witnesses stated that Gaujot not only used the water cure but also hung the priests by the neck, beat them, and jumped on them as they lay on the ground.”²⁹⁸ Commanding General of the Army, General Nelson A. Miles reported that “these priests were taken out to be killed, and were only saved by the prompt action of Major Carrington”²⁹⁹ In a communication to Secretary Root, General Chaffee opined that “Trial ‘Gaujot’ [is] liable [to] disclose disgraceful inhuman treatment [of] three padres.”³⁰⁰ It appears that Lieutenant Gaujot tortured the priests at the verbal direction of Major Glenn.³⁰¹

Lieutenant Gaujot was court-martialed in late April of 1902, by the same court-martial panel that convicted Major Glenn.³⁰² Charged with conduct prejudicial to good order and military discipline,³⁰³ the three specifications were that Gaujot ordered and directed application of the water cure to the three priests.³⁰⁴

At trial, no witnesses were called; Gaujot made a statement to the court in which he offered a justification:

The three native priests to whom I administered the “water cure” were insurgents. I knew them to be such. One of them was from Balangiga. I knew that they possessed

295. Andrew Rooke, *History of the Theosophical Society (Pasadena): Profiles of its Leaders*, THEOSOPHY DOWNUNDER, <http://www.theosophydownunder.org/library/theosophical-history/history-of-the-theosophical-society-pasadena-profiles-of-its-leaders-compiled-by-andrew-rooke/> (last visited Oct. 6, 2016).

296. JONES, *supra* note 8, at 244.

297. *Secretary of War Report of March, 1903*, *supra* note 7, at 28-29; *see also* JONES, *supra* note 8, at 244.

298. EINOLF, *supra* note 64, at 90. Father Nicanor Acebedo’s name is sometimes set forth as “Nicanor Alcebedo” including in records of the Army.

299. *Gen. Miles’s Report*, *supra* note 63.

300. EINOLF, *supra* note 64, at 159.

301. *Id.* at 91.

302. Lieutenant Gaujot was court-martialed at the direction of President Roosevelt and Secretary of War Root. EINOLF, *supra* note 64, at 157 (source does not specifically speak to Roosevelt’s involvement.)

303. 1902 General Orders and Circulars, *supra* note 262, at 565-66; *Secretary of War Report of March, 1903*, *supra* note 7, at 28.

304. 1902 General Orders and Circulars, *supra* note 262, at 564-65.

information that would be valuable to the American cause. They would not give the information voluntarily, and had they done so they would have been killed by the insurgents I was forced to extract the information from the priests by the methods employed. I thought I was acting for the best interests of the service. I did not coerce them for my own personal gratification, but for the purpose of obtaining information that would enable us to strike a blow at the insurrection and to establish and maintain American authority in the island of Samar.³⁰⁵

Thereupon Lieutenant Gaujot pled guilty to the three specifications and the charge.³⁰⁶ General Miles suggested that the guilty plea was strategic: “His pleading guilty prevented all the facts and circumstances being developed.”³⁰⁷ Gaujot was sentenced: “To be suspended from command for the period of three months, forfeiting fifty dollars of his pay per month for the same period.”³⁰⁸

The court had before it commendatory letters on Lieutenant Gaujot’s behalf, prompting the court to explain “[t]he court is thus lenient on account of the excellent character and valuable services rendered, as shown by testimonials attached to the record” and to attach a unanimous clemency recommendation to the record.³⁰⁹

Secretary Root transmitted the records in the Gaujot and Glenn cases to President Roosevelt. As to the Gaujot case, he adopted by implication his analysis in the Glenn case that the sentence imposed was inadequate but that the sympathy of the court indicated the futility of returning the findings and sentence.³¹⁰ President Roosevelt approved the findings in the Gaujot case and confirmed the sentence.³¹¹

Following Lieutenant Gaujot’s conviction for the water torture of the three priests he was allowed to remain in the Army, eventually serving in Cuba, on the Mexican border, and in World War I, in addition to his service in the Philippines.³¹² He was awarded the Medal of Honor for his actions on the Mexican border. He retired from the Army in 1934 with the rank of Colonel, died in 1938, and is buried in Arlington Cemetery.³¹³

305. *Secretary of War Report of March, 1903*, *supra* note 7, at 29.

306. *Secretary of War Report of March, 1903*, *supra* note 7, at 29.

307. *Gen. Miles’s Report*, *supra* note 63.

308. 1902 General Orders and Circulars, *supra* note 262, at 565-66. General Miles characterized the sentence as “trivial.” *Gen. Miles’s Report*, *supra* note 63.

309. *Secretary of War Report of March, 1903*, *supra* note 7 at 29-30 (noting commendatory letters from Captain George L. Byram, Major General Loyd Wheaton, and Brigadier General J. H. Smith (who had already been court-martialed and convicted by the time of the Gaujot trial)).

310. *Id.* at 20 (“The memoranda by the Judge-Advocate-General which accompany the papers show fully the grounds upon which I recommend the confirmation of the sentences in the water-cure cases”), 28.

311. *Id.* at 19.

312. *Gaujot, Julien E., COL, TOGETHER WE SERVED*, <http://army.togetherweserved.com/army/servlet/tws.webapp.WebApp?cmd=ShadowBoxProfile&type=Person&ID=260050> (last visited Oct. 8, 2016); <http://public.mapper.army.mil/ANC/ANCWeb/PublicWMV/ancWeb.html> (§6, grave 8423-NH).

313. What became of the Filipinos Lieutenant Gaujot was convicted of torturing? Father Donato B. Guimbaolbot was the parish priest for Balangiga at the time of the incident there. It is reported that he confessed under torture to advance knowledge of the planned attack, but not to participation in the plan. It is said that he refused an offer of compensation for being tortured with the response “Why should you pay me for my love of country?” Borrinaga and Rosaldo, *supra* note 238. After his release, Father Guimbaolbot went to his hometown, Guiuan on Samar, to recover. He returned to Balangiga in April of 1903 and served a year as a parish priest there. After the year he was assigned to be a parish priest at his

D. Captain James A. Ryan

James A. Ryan was born in Danbury, Connecticut and was an 1890 West Point graduate.³¹⁴ On December 1, 1901 he caused the water torture of the presidente and vice-presidente of Jiminez, Mindanao, Uvaldo Abing and Luis Girmeno, by having their heads immersed in a bucket of water.³¹⁵

On April 10, 1902, Secretary Root sent a report of the attorney-general of the Philippines to General Chaffee in the Philippines “with special reference to the manner in which evidence was obtained by Capt. James A. Ryan . . . from prisoners at Jiminez, Mindanao, with instructions to ascertain whether the facts stated can be substantiated and if so to place Captain Ryan on trial.”³¹⁶ Captain Ryan was not tried with Major Glenn and Lieutenant Gaujot because the investigation of the allegations against him was not completed in time.³¹⁷

Captain Ryan was acquitted.³¹⁸ Upon his review, Judge Advocate General George B. Davis found that:

Capt[ain] Ryan’s command had no orders to do more than protect itself. He had no orders to execute, no policy to carry into effect, no operations to carry on, which he could not safely undertake with the force under his command. He was surrounded by natives who professed allegiance to the United States, but whose sympathies were with the insurrection. By the application of the water cure he was able to verify the accuracy of knowledge already in his possession, but which he did not need to put him on his guard, and which did not materially imperil the safety of his command. In dealing with a treacherous enemy he found it convenient to extort a confession by the use of illicit force, but this does not justify his resort to torture in the specific case set forth which was the issue referred to court for trial.³¹⁹

hometown of Guiuan, where he remained until his death in 1949. He retained an antipathy to Americans for the rest of his life; when the Americans returned to Guiuan in 1944 to establish a naval base he said: “Take note, the American presence here is not a blessing; rather, it is a disgrace.” *Id.* The Father was described by a fellow priest as a “silent type of person, devoted to prayer. He lived a pious, humble and simple life.” *Id.* A monument to Father Guimbaolibot stands in his hometown; in 1995 an effort was announced for his beatification.

Father Jose Diaznes was a parish priest at Calbayog City on Samar at the time he was tortured. He met with General Miles during the General’s inspection trip in late 1902. Miles’s report includes the Father’s allegations that the water torture knocked out his two front teeth, that he was otherwise maltreated, and that the Americans robbed him of \$300. *Gen. Miles’s Report, supra* note 63. After his release, Father Diaznes resumed his duties as parish priest of Calbayog.

Father Nicanor Acebedo was a parish priest at Basey on Samar at the time he was tortured. It is reported that he was “injured for life.” Borrinaga and Rosaldo, *supra* note 238. Father Acebedo died on February 11, 1945. Ivo Velasquez, *The Heroism of my Ancestors: Fr. Nicanor Acebedo, IVO’S SANCTUARY*, (July 19, 2011, 2:49 PM) <http://amaranthsanctuary.blogspot.com/2011/07/heroism-of-my-ancestors.html>.

314. West Point Association of Graduates, *James A. Ryan 1890*, <https://apps.westpointaog.org/Memorials/Article/3558/>.

315. *Secretary of War Report of March, 1903, supra* note 7, at 64-65.

316. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1326 (cable of April 10, 1902, from Assistant Adjutant General George Andrews to Major-General Adna Chaffee).

317. *Id.* at 1343-44 (cable of June 10, 1902, from Major-General Adna Chaffee to Major-General H.C. Corbin).

318. JONES, *supra* note 8, at 341.

319. *Cruelty in Philippines, supra* note 178.

The Judge Advocate General was critical of Captain Ryan's court-martial:

The case was not vigorously prosecuted, and the court allowed the accused a very wide latitude in the presentation of his defense, going so far as to permit the introduction of clearly irrelevant matter relating to transactions which were foreign to the issue as set forth in the charges referred for trial. Its action in acquitting the accused amounts, in substance, to a decision that the use of force in the form and under the circumstances set forth in the record is lawful.³²⁰

Having declared: "In this conclusion the department cannot, in my opinion, safely concur," the Judge Advocate General explained the perils of agreeing with the conclusion that water torture could be lawful:

No modern State, which is a party to international law, can sanction either expressly or by a silence, which imports consent, a resort to torture with a view of obtaining confessions as an incident to its military operations. If it does, where is the line to be drawn? If the 'water cure' is ineffective, what shall be the next step? Shall the victim be suspended, head down, over the smoke of a smoldering fire; shall he be tightly bound and dropped from a distance of several feet? Shall he be beaten with rods? Shall his shins be rubbed with a broomstick until they bleed? For all these, and more, have been done during the Spanish domination in the Philippine Islands, and the temptation to revive them, under the circumstances of sufficient provocation, may prove too strong to be resisted. Again, suppose a native to die under an unusually vigorous administration of the 'water cure.' How is the incident to be explained to the satisfaction of the American people? But it seems hardly necessary to pursue the subject further.³²¹

The Judge Advocate General's conclusion followed his analysis: "The United States cannot afford to sanction the addition of torture to the several forms of force which may be legitimately employed in war, and it is, therefore, recommended that the proceedings, findings, and acquittal be disapproved."³²²

Following his acquittal, Captain Ryan remained in the Army.³²³ He served as an Associate Professor of Modern Languages at West Point and took part in the Mexican campaign of 1916. Rising to the rank of Brigadier General, he retired from the Army at the conclusion of World War I. After the Army, he involved himself in business, including investment banking, oil, railroads, and health care. He retired from business in 1941 and died in 1956.

E. Captain Cornelius M. Brownell

Cornelius M. Brownell was from Burlington, Vermont, having been born there in November of 1871.³²⁴ On or about November 25, 1900, Captain Brownell caused the water torture and death of Father Augustin de la Pena.³²⁵

320. *Id.*

321. *Id.*

322. *Id.*

323. *James A. Ryan 1890*, WEST POINT ASS'N OF GRADUATES, <https://apps.westpointaog.org/Memorials/Article/3358/> (last visited Oct. 2, 2016).

324. *Two Murderers. Massachusetts*, CITY AND STATE, 124 (1903).

325. *Secretary of War Report of March, 1903*, *supra* note 7, at 78-150. The Father's name is variously reported as "Augustine" and "Augustin." *A Priest Murdered by "Water-Cure,"* THE SACRED HEART

According to two soldiers, “it was reported that Father Augustin knew where insurgent gold was buried, and the men were anxious to have him tell them where it could be found.”³²⁶ Father Augustin was captured in December of 1900, and confined to a prison in Banate: “Not receiving the information required, the soldiers on the night of Dec. 9, took the priest to a house formerly occupied by the president of the village. Upon his arrival at the house, Mr. Bertrand says the ‘water-cure’ was given the priest by the ‘water-cure’ squad.”³²⁷

According to Secretary Root, Captain Brownell ordered and personally supervised the torture of Father Augustin, and Father Augustin died “as a consequence of the administration of torture.”³²⁸

Captain Brownell admitted his role in Father Augustin’s torture and death in a statement released to the Senate.³²⁹ He first ordered the water cure to force Father Augustin to disclose information required for the Army to seize certain funds:

Knowing that there was on deposit in the city of Iloilo a large sum of money awaiting his order . . . I insisted that he [Father Augustine] would be obliged to deliver orders for this money to me.

The time given him having expired without result, he was brought into my presence and that of other officers and enlisted men and told that he would be blindfolded and the water cure administered until he acceded to my request.

The water cure was administered for a short time.

He insisted that it belonged to the Pope at Rome The cure was continued.³³⁰

Having gotten the information on the money, Captain Brownell demanded that Father Augustin give him information on the location of a Filipino commander:

He (the priest) was in a dejected mood, despondent, thoroughly discouraged. He told me that he had better be dead, and wished that he might die. . . . I gave him until a certain hour to consider whether he would disclose the hiding-place or not. At the expiration of this time he declined to disclose Salas’s whereabouts.

I finally ordered that the cure be again administered to him and stepped into an adjoining room.

In a very short time . . . I was warned by a disturbance in the room where the prisoner was that something was wrong, and upon entering the room the man was dead.³³¹

Even after Father Augustin was killed, Captain Brownell claimed that the water cure was not cruel, especially so because he carefully selected the soldiers to administer it:

The water cure was administered by my order several times to different natives

REVIEW, Number 17, April 26, 1902 (“Augustine”); EINOLF, *supra* note 64, at 73 (“Augustin”). The New York Times included both versions in the same article. *Cruelty in Philippines*, *supra* note 178 (“Augustin” in headline, “Augustine” in body of article). Augustin appears to be correct. Gregorio de la Pena v. Government of the Philippine Islands, G.R. No. L-17585, June 5, 1922.

326. *A Priest Murdered by “Water-Cure,”* THE SACRED HEART REVIEW, April 26, 1902.

327. *Id.*

328. In the Matter of Father Augustine de la Pena, 24 Op. Att’y Gen. 570 (1903).

329. *Remarkable Scene*, *supra* note 84, at 133.

330. *Id.* at 134.

331. *Id.*

. . . I do not and never have believed it cruel or barbarous in any manner, and whenever it became necessary, in my judgment, to administer it, the men chosen for that duty were chosen with a view to having only intelligent, careful, humane men perform the operation.³³²

The water torture and death of Father Augustin was the subject of popular comment. One editorial writer noted the Senate statement and called for a public investigation of Captain Brownell's actions:

Two murderers are now prominently on trial before the moral judgment seat of these United States and the world. One of these is . . . Captain Cornelius M. Brownell, of Burlington, Vermont . . . The case of Cornelius M. Brownell, murderer, would be heard, all necessary witnesses would be summoned, and their testimony would be carried by the press to the entire country, and a moral verdict on the evidence would be rendered. Then the world would know precisely where this nation stands in relation to the crime of murder, and murder by torture oft repeated, upon a helpless priest and prisoner. It is a matter of supreme moment to know the nation's verdict on such a matter as this for on it depends the world's judgment of us, our judgment of ourselves, and our moral standing in history.³³³

Father Augustin was killed in December of 1900. Secretary Root requested a legal opinion on the case from the Attorney General on November 21, 1902, almost two years after the fact. The Attorney General responded to Secretary Root on January 26, 1903. The Attorney General opined that the allegations against Captain Brownell would constitute crimes under both American and Spanish law,³³⁴ and noted that the allegations might also "be regarded as a violation of the laws of war."³³⁵

Upon his review in March of 1903, Judge Advocate General George B. Davis found that Captain Brownell had no assigned duties that would call for the interrogation of Father Augustin,³³⁶ and concluded: "Having an important individual of the enemy in his power, he yielded to a prurient curiosity, and, in an attempt to extort information, caused the death of the prisoner upon whose person the torture had been inflicted."³³⁷ The Judge Advocate General cited the general proposition that torture is a violation of the laws of war.³³⁸ In doing so, the Judge Advocate General conflated the provisions of Lieber code Rule 16 ("to obtain . . . confessions . . .") and Rule 80 ("to obtain . . . information . . ."). This may explain why the Judge Advocate General considered whether military necessity was present as a justification for Captain Brownell:

332. *Id.*

333. Herbert Welsh, *Two Murderers. Massachusetts*. CITY AND STATE, Feb. 12, 1903, at 124 ("The public has only had an ex-parte statement made by [Captain Brownell] and given to the United States Senate and the world . . . It is possible that his ex-parte statement may do Captain Brownell an injustice. As given by himself it declares Captain Brownell a murderer of a very horrible kind, but alleges extenuating circumstances.").

334. Knox, *supra* note 328, at 570 ("The alleged offense would, under our system of laws, be either murder or manslaughter, and under Spanish law assassination or homicide, according to the motives and circumstances.").

335. *Id.* at 571.

336. *Cruelty in Philippines*, *supra* note 178.

337. *Id.*

338. *Id.*

Having regard to the circumstances attending Capt. Brownell's act in extorting information from the native priest at Banate, I find it difficult to escape the conclusion that it was not justified by military necessity, and that there did not exist at the time of its commission a condition of emergency so instant, imperious, and overwhelming in its character as to justify Capt. Brownell in the specific violation of the requirements of the General Orders No. 100, which has been made the subject of this investigation.³³⁹

The delay in bringing any charges against Captain Brownell raised significant problems. Having concluded that Captain Brownell should be prosecuted,³⁴⁰ the Judge Advocate General had to concede that he was beyond the jurisdiction of any court:

The Judge Advocate General, however, sees no legal way by which Capt. Brownell can be tried now either by a military court or by the civil courts of the United States or of Panay, where the crime was committed. By his advice the legal question was referred to the Attorney General, who held that there was no means by which Brownell could be tried and punished for causing the death of Father Augustine.³⁴¹

The Attorney General agreed that Captain Brownell was beyond prosecution. He could not be tried by court-martial since he was no longer in the military.³⁴² He could not be tried by an American military tribunal because the administration had declared an end to the hostilities.³⁴³ Attorney General Knox found the laws of war to be exclusive in this case.³⁴⁴

Vermont Senator Redfield Proctor said that "Capt. Cornelius M. Brownell . . . was a Vermont man, and that there was no better specimen of the volunteer soldier in Vermont or any other State."³⁴⁵ Captain Brownell was never prosecuted for the water torture and death of Father Augustin de la Pena. After he left the Army Brownell reportedly returned to Vermont and made a career in insurance.³⁴⁶

339. *Id.*

340. *Id.*

341. *Id.*; see also HERBERT WELSH, TO LINCOLN'S PLAIN PEOPLE: FACTS REGARDING "BENEVOLENT ASSIMILATION" IN THE PHILIPPINE ISLANDS, CITY AND STATE 12 (1903) (referring to "technicalities, such as allowed Captain Brownell to escape punishment for the torture and murder of Father Augustine.").

342. Knox Opinion Letter, *supra* note 328 ("It seems to be clear from the authorities that no military court can now try Captain Brownell Because a court martial has no jurisdiction since he has left the service.").

343. *Id.* ("It seems to be clear from the authorities that no military court can now try Captain Brownell . . . now that peace has been proclaimed in the Philippines.").

344. *Id.*

345. *Proceedings in Congress: Bitter Words Used in Senate in Philippine Debate – Mr. Rawlins Denounces Charge That Democrats Assailed the Army*, N.Y. TIMES, Jan. 29, 1903.

346. MELVIN L. SEVERY, GILLETTE'S SOCIAL REDEMPTION 239 (1907) ("Cornelius M. Brownell, of Burlington, Vt., . . . [is] now in the insurance business"); THE STANDARD, Vol. 51 (reporting appointment of Cornelius M. Brownell to represent the Maryland Casualty Company in Burlington, Vermont).

What became of the Filipino Captain Brownell tortured and killed? Although Father Augustin died while in Army custody, his legacy continued. He is today lauded by some contemporary Filipinos as a "religious patriot" who "helped keep the fight going by raising funds for the Iloilo revolutionary government." Henry F. Funtecha, *Fr. Augustine De la Peña: The Religious Patriot*, THE NEWS TODAY (Iloilo City, Philippines) (Oct. 2006),

F. Lieutenant Frederick B. Hennessy

Lieutenant Frederick B. Hennessy was accused of causing the death of a Filipino, Vincente Luna, through the administration of the water cure prior to January, 1902, at Lipa in Batangas.³⁴⁷

[The people of Lipa] declared that fifteen of their people had been tortured by what is known as the water torture, and that one man, a highly respected citizen, aged sixty-five years, named Vincente Luna, while suffering from the effects of the torture and unconscious, was dragged into his house, which had been set on fire, and was burned to death. They stated that these atrocities were committed by a company of scouts under command of Lieut. Hennessey³⁴⁸

Having claimed that “there was no one to whom such abuses . . . are more objectionable,” and describing the water torture as “illegal and unauthorized acts,” General J. Franklin Bell tasked Captain D. H. Houghton to investigate the allegation.³⁴⁹ Houghton found that indigenous scouts under Hennessy’s command had killed Luna through water torture. But Captain Houghton recommended not prosecuting Lieutenant Hennessy because of the passage of time, and because Hennessy’s “‘zealous,’ ‘ambitious,’ and ‘gallant’ service, along with his ‘youth’ and ‘lack of previous instruction and training,’ entitled him to ‘some consideration.’”³⁵⁰

Lieutenant Hennessy was never prosecuted for the death of Vincente Luna. Hennessy was allowed to remain in the Army.³⁵¹ A pioneer aviator, he rose to the rank of colonel. He died in 1948 and is buried in Arlington Cemetery.³⁵²

G. Lieutenant Edwin E. Hickman

Lieutenant Edwin E. Hickman was accused of the water torture of two Filipino prisoners at Tayabas on Luzon in November of 1901. He admitted dunking prisoners to frighten them into divulging information, but denied that he had used the water cure. Lieutenant Hickman was court-martialed, with the court finding him “guilty without criminality.”³⁵³

Lieutenant Hickman’s case was reviewed by Army Judge Advocate General Davis. General Davis was disturbed at the action of the court:

No modern state, which is a party to international law, can sanction, either expressly or by a silence which imports consent, a resort to torture with a view to obtain

<http://www.thenewstoday.info/2006/10/13/fr.agustin.de.la.pena.the.religious.patriot.html> (“In effect, Father de la Peña died a martyr for the Revolution and for his people.”).

347. JONES, *supra* note 8, at 345; EINOLF, *supra* note 64, at 156. General Benjamin F. Bell reported that the allegation was received from Luna’s wife in January of 1902 but was misfiled until April, at which time an investigation was launched.

348. *Gen. Miles’s Report*, *supra* note 63 (statement of Gen. Miles). The General further reported that “I have no reason to disbelieve their statements; in fact, the instances of torture and the case of the man Luna having been tortured and burned to death are confirmed by other reports.” *Id.*

349. EINOLF, *supra* note 64, at 156.

350. *Id.*

351. *Frederick B. Hennessy*, Early Aviators, <http://www.earlyaviators.com/eheness.htm>.

352. Find a Grave, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=49202379> (last visited November, 29, 2016).

353. EINOLF, *supra* note 64, at 161.

confessions, as an incident to its military operations. If it does, where is the line to be drawn? If the 'water cure' ineffective, what shall be the next step? Shall the victim be suspended, head down, over the smoke of a smouldering fire; shall he be tightly bound and dropped from a distance of several feet; shall he be beaten with rods; shall his shins be rubbed with a broomstick until they bleed?³⁵⁴

Acting on General Davis' recommendation with respect to Lieutenant Hickman, in January of 1903, President Roosevelt disapproved the findings and acquittal.³⁵⁵

H. Sergeant Januarius Manning

Sergeant Januarius Manning was identified by a witness before the Lodge Committee as having ordered men under his command to punish Filipinos by infliction of the water cure in late August of 1900.³⁵⁶ Subsequently, Sergeant Manning testified before the Lodge Committee and admitted to having directed his men to perform the water cure on prisoners.³⁵⁷ By the time he testified, Sergeant Manning had returned to the United States from the Philippines.³⁵⁸ Despite his admission and the corroborating testimony, Sergeant Manning was never prosecuted.

I. Captain Samuels

A district commander on Cebu, Colonel E. J. McClelland arrested a captain under his command, identified only as "Captain Samuels," for the water torture of two prisoners in August of 1900. Brigadier General Robert P. Hughes, charged his judge-advocate to investigate the charges. In November of 1900, the judge-advocate, Captain Edwin F. Glenn, recommended against prosecuting Captain Samuels.³⁵⁹

In the summer of 1902, a Philippine newspaper printed the allegation against Captain Samuels. An "investigation found that the charges against Samuels seemed substantiated, but Samuels had left the Philippines and the army was not able to bring him to trial."³⁶⁰ General Miles noted the allegations in his 1903 report.³⁶¹

J. Lieutenant L. W. Caffey

Credible allegations were made that Lieutenant L. W. Caffey had used the water cure on Filipino prisoners. By the time the allegations were reviewed, he had transferred from the volunteers to the regular army, a circumstance the Attorney General had opined made prosecution impossible.³⁶²

Speaking at Arlington Cemetery on Memorial Day, 1902, about the crimes of our soldiers in the Philippines, President Roosevelt declared: "Determined and unswerving effort must be made, and has been and is being made, to find out every

354. Borch, *supra* note 11, at 14-15.

355. *Id.* at 15.

356. *Lodge Committee Hearings*, *supra* note 6, at 1969-71 (testimony of Sergeant Leroy E. Hallock).

357. *Id.* at 2252 (testimony of Sergeant Januarius Manning).

358. *Id.*

359. EINOLF, *supra* note 64, at 73.

360. *Id.* at 162.

361. *Gen. Miles's Report*, *supra* note 63.

362. EINOLF, *supra* note 64, at 166-67.

instance of barbarity on the part of our troops, [and] to punish those guilty of it.”³⁶³ Consideration of the water-torture cases suggests how far short his administration fell of that goal. The water-torture cases suggest three conclusions: these may be drawn from an examination of who was charged, with what they were charged, and the punishments received by those found guilty.

The first conclusion from the water-torture cases flows from who was charged, and it is that these cases were substantially under-prosecuted. This occurred in four ways, the first three of which are illustrated by the case of Major Glenn. First, his situation was under-prosecuted because, although he was involved in widespread water torture, he was prosecuted for only one incident, the water torture of Joveniano Ealdama at Igaras on November 27, 1900.

Major Glenn’s case also illustrates the second way in which water torture was under-prosecuted. Subjecting Filipinos to the water cure required the participation of more than one person. The other soldiers—officers and enlisted men—who joined Major Glenn in his use of water torture were never charged. For example, the War Department had been told that Joveniano Ealdama was water tortured “by a detachment of the Eighteenth Regiment U.S. Infantry, under command Lieut. Arthur L. Conger, under orders of Maj. Edwin F. Glenn, then captain, Twenty-Fifth Regiment U.S. Infantry, and that Capt. and Asst. Surg. Palmer Lyon, at that time a contract surgeon, was present to assist them,” and although the War Department directed that “[t]he officers named, or such of them as are found to be responsible for the act, will be tried therefore by court-martial,” only Major Glenn was tried.³⁶⁴

The third way in which these crimes were under-prosecuted is that the superior officers who knew of the practice and either approved of or failed to prevent the water torture were never charged. None of Major Glenn’s superiors were prosecuted for the water torture of Joveniano Ealdama. Did they know of Major Glenn’s activities? Professor Einolf addresses the question:

Despite his claim to the Senate Committee that he knew nothing of the water cure, Brigadier General Robert P. Hughes allowed his chief intelligence officer, Major Edwin Glenn, to use it extensively on Panay and Samar. Glenn’s actions were common knowledge among Hughes’s command, and if Hughes really did not know what Glenn was doing, he must have worked hard to keep himself ignorant.³⁶⁵

General Miles made it clear that he thought General Hughes knew about the water torture. He noted the work of Major Glenn and “Glenn’s brigade” in water torture and commented: “Whether it was possible for officers to be engaged in such acts without the personal knowledge of the General upon whose staff they were serving at the time, namely, Brig. Gen. Hughes, I leave for others to conjecture.”³⁶⁶

The pattern of not prosecuting commanders for ordering or allowing the war crimes of their subordinates did not extend to the Filipino nationalists. Filipino commanders were sentenced to lengthy imprisonment or death based on the crimes

363. *Roosevelt Memorial Day Address*, *supra* note 13.

364. CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1328 (cable of April 16, 1902, from Major-General H.C. Corbin to Major-General Adna Chaffee).

365. EINOLF, *supra* note 64, at 179.

366. *Gen. Miles’s Report*, *supra* note 63.

of their subordinates.³⁶⁷

The fourth way in which these crimes were under-prosecuted is that there were many instances of water torture for which no one was ever prosecuted. As one author notes:

Scores of cases of torture, summary executions and other questionable military actions had been brought to light in Senate hearings, courts-martial, boards of inquiry and independent probes. Yet Roosevelt's pledge to deliver justice had proven hollow. Only three officers had been punished.³⁶⁸

The second conclusion from the water-torture cases concerns with what those prosecuted were charged. It is that the few individuals who were prosecuted were substantially under-charged. Major Glenn, Lieutenant Gaujot, Captain Ryan, and Lieutenant Hickman were all court-martialed for the water torture of prisoners. They could have been charged under Rule 16 of the Lieber code.³⁶⁹ But all four were instead charged with the much less serious offense of conduct prejudicial to good order and military discipline.

The third conclusion from the water-torture cases concerns the punishments given those found guilty. It is that the very few individuals who were successfully prosecuted were given only trivial sentences.³⁷⁰ Of the ten cases discussed above, only two—Major Glenn and Lieutenant Gaujot—resulted in convictions. Major Glenn received a token penalty for the water torture of Joveniano Ealdama: a \$50 fine and a thirty day suspension from command. Lieutenant Gaujot received a similarly trivial penalty for the water torture of Father Nicanor Acebedo, Father

367. The disparity between the treatment of American and Filipino commanders is clear. For example, one study found:

There are numerous instances, especially with reference to the Philippine Insurrection in 1900 and 1901, where commanding officers were found to have violated the laws of war by specifically ordering members of their command to commit atrocities and other war crimes And in other cases officers have been held liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power.

Richard A. Falk, Gabriel Kolko & Robert Jay Lifton, *CRIMES OF WAR* 157-58 (1971).

Ten cases are cited to support the point, without analysis as to the affiliations of the defendants or the sentences imposed. In fact, all of the cases involved Filipino nationalists, not Americans or their Filipino minions. *Id.* ("Francisco Frani, Eugenio Fernandez, Juan Soriano, Ciriaco Cabungal, Natalio Valencia, Aniceta Angeles, Francisco Braganza, Lorenzo Andaya, Pedro Abad Santos, and Pedro A. Cruz."). The sentences imposed were harsh. In eight of the ten cases the Filipinos were sentenced to death. *Lodge Committee Hearings, supra* note 6, at 1083-84 (Francisco Frani), 1114-15 (Eugenio Fernandez), 1227-28 (Ciriaco Cabungal), 1239-40 (Natalio Valencia), 1254-55 (Aniceta Angeles), 1278-80 (Francisco Braganza), 1291-92 (Lorenzo Andaya), 1190-91 (Pedro Abad Santos). One of the Filipinos was sentenced to life (*id.* at 1115-17 (Juan Soriano)) and one was sentenced to twenty years (*id.* at 1369 (Pedro A. Cruz)). Three of the Filipinos sentenced to death had their sentences reduced by the reviewing authority, one to life (*id.* at 1227-28 (Ciriaco Cabungal)), one to twenty-five years (*id.* at 1190-91 (Pedro Abad Santos)), and one to fifteen years (*id.* at 1291-92 (Lorenzo Andaya)). The reviewing authority disapproved of one twenty-year sentence and freed the defendant (*id.* at 1369-70 (Pedro A. Cruz)).

368. JONES, *supra* note 8, at 343 (referring to General Smith, Major Glenn, and Lieutenant Gaujot).

369. In addition to being charged under Rule 16, they could also have been charged with violations of Rules 75, 76, and 80 of the Lieber code.

370. WITT, *supra* note 34, at 361 ("[Major Edwin Glenn's] sentence barely amounted to a proverbial slap on the wrist The sentence was typical of other officers convicted at courts-martial for similar offenses."). In contrast, seventy-nine nationalists were hanged and hundreds were sentenced to lengthy prison terms. JONES, *supra* note 8, at 215.

Donato Guimbaolibot, and Father Jose Diaznes: a \$150 fine and a ninety day suspension from command.

One author disputed the assertion that the sentences imposed in the general range of Philippine-American War court-martials were lenient.³⁷¹ The conclusion is unjustified in the general sweep of torture cases.³⁷² It is clearly erroneous as to the water torture cases, where only four individuals were court-martialed and where, in the two cases where convictions were obtained, no prison time was assigned.

In August of 1902, President Roosevelt spoke of the instances where American soldiers had violated the rules of war: "There have been a few, and only a few, such instances in the Philippines; and punishment has been meted out with unflinching justice to the offenders."³⁷³ There were many more than a few instances, and the justice was anything but unflinching. President Roosevelt's imperative that there be fair punishment was not fulfilled.³⁷⁴

In the ten cases discussed above, President Roosevelt's imperative to fairly punish those guilty of water torture was not fulfilled. There was, however, another case in which a soldier engaged in the suppression of armed insurrection by Filipinos was accused of crimes including water torture. In that case an American military tribunal in the Philippines convicted the soldier and handed down a life sentence.³⁷⁵

One of the victims in that case was Ramon Navarro, a Manila lawyer. Navarro was taken into custody and questioned because it was suspected that he had information about insurgent operations. He testified as to the techniques used:

- A: When [the soldier] could not get anything out of me . . . I was ordered to lay on a bench [he] tied my feet, hands, and neck to that bench lying with my face upward. After I was tied to the bench [he] placed some cloth on my face and then with water from the faucet they poured on me until I became unconscious. He repeated that four or five times.
- Q: You mean he brought water and poured water down your throat?
- A: No sir, on my face, until I became unconscious. We were lying that way with some cloth on my face and then [he] poured water on my face continuously.
- Q: And you couldn't breath?

371. Welch, *supra* note 11, at 239-40 ("[Anti-imperialist Moorfield] Storey and other anti-imperialists undoubtedly exaggerated the leniency of those instruments of military justice. Not only were officers and men court-martialed, but in a few cases long periods of imprisonment were assigned." The author did acknowledge that "[o]fficers were apparently considered gentlemen who deserved the benefit of any doubts.").

372. EINOLF, *supra* note 64, at 169 ("[F]ew were convicted, and those who were found guilty only received mild punishments . . .").

373. JONES, *supra* note 8, at 339.

374. One author suggests that President Roosevelt and Secretary Root manipulated the court-martial system to satisfy public concern about atrocities while deliberately protecting those prosecuted from sentences that would harm their military careers. OSWALD, *supra* note 61, at 15-16 ("Roosevelt's heavy hand in staging the courts-martial, when viewed through the lens of the domestic political context, suggests an improper use of the military justice system to deflect political and public criticism over the conduct and objectives of the lingering war while at the same time minimizing the consequences of judicial action upon the officers concerned.").

375. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 482-84 (2007).

- A: No, I could not and so I for a time lost consciousness. I found my consciousness came back again and found [he] was sitting on my stomach and then I vomited the water from my stomach and the consciousness came back again for me.
- Q: Where did the water come out when he sat on your stomach?
- A: From my mouth and all openings of my face . . . and then [he] would repeat the same treatment and the same procedure to me until I became unconscious again.
- Q: How many times did that happen?
- A: Around four or five times from two o'clock up to four o'clock in the afternoon. When I was not able to endure his punishment which I received I told a lie to [him] . . . I could not really show anything to [him] because I was really lying just to stop the torture.³⁷⁶

The facts are familiar. The victims were Filipino. The method of torture was the water cure. The court was an American military tribunal. But there was one difference: the torturer was not an American soldier from the Philippine-American War. He was Sergeant-Major Chinsaku Yuki of the Imperial Japanese Army's secret police, the Kempeitai, and the torture of Ramon Navarro and the other Filipino victims occurred during the Second World War.³⁷⁷

Upon conviction, Sergeant-Major Yuki was sentenced to life imprisonment.³⁷⁸ While one might be tempted to conclude that the disparity in sentences between Major Glenn and Sergeant-Major Chinsaku was simply a reflection of victor's justice, it should be noted that Sergeant-Major Chinsaku did not serve out his life sentence.³⁷⁹ Even water torturers from defeated armies, it seems, escape punishment commensurate with their actions.

376. *Id.* at 483.

377. The charge against Sergeant-Major Yuki was that he "did violate the laws and customs of war." *United States v. Yuki* (Before a Military Commission Convened by the Commanding General, Philippines-Ryukyus Command), Vol. I, at 7 (Mar. 21, 1947), www.legal-tools.org/uploads/tx_ltpdb/98.3078-3106.pdf. The three specifications were that Sergeant-Major Yuki "did . . . wrongfully and unlawfully torture . . . [three] unarmed, noncombatant Filipino civilians, in violation of the laws and customs of war," that he "did . . . wrongfully and unlawfully permit members of the Imperial Japanese Army then under his command to torture . . . an unarmed, noncombatant Filipina, in violation of the laws and customs of war," and that he "did . . . wrongfully and unlawfully permit members of the Imperial Japanese Army then under his command, to kill . . . an unarmed, noncombatant Filipina, in violation of the laws and customs of war." *Id.* Sergeant-Major Yuki pled not guilty to the charge and all three specifications. *Id.* at 10.

378. *United States v. Yuki* (Before a Military Commission Convened by the Commanding General, Philippines-Ryukyus Command), Vol. VI, at 249-50 (Apr. 12, 1947), http://www.legal-tools.org/uploads/tx_ltpdb/98.3370-3379.pdf (finding Yuki guilty of specifications 1, 2, and 3; guilty of the charge; and sentencing him to life imprisonment).

379. It is reported that no Class B or C Japanese war criminal from the Second World War was still in prison after 1958. Beatrice Trefalt, *Faltering Resolve: The Early Release of Japan's 'Ordinary' War Criminals*, ASIAN CURRENTS, July, 2011, at 18-19 (noting that in July, 1953 the last Japanese BC prisoners were repatriated from the Philippines to Japan's Sugamo prison. "By 1958, all war criminals convicted under the BC trial system had been released from Sugamo."); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 219 n.29 (1997) (citing GAVAN DAWES, PRISONERS OF THE JAPANESE: POWS OF WORLD WAR II IN THE PACIFIC 373 (1994) ("noting that, due to commutations and clemency, the longest sentence actually served by any Japanese war criminal was less than 13 years and that by the end of 1958 all war criminals were free.")).

IV. STRONG PREVENTION: REFORM AFTER THE PHILIPPINE-AMERICAN WAR

President Roosevelt's final imperative was that "[d]etermined and unswerving effort must be made . . . to take, if possible, even stronger measures than have already been taken to minimize or prevent the occurrence of all such acts in the future,"³⁸⁰ and "to see that the most rigorous care is exercised to . . . prevent any cruelty or brutality . . ."³⁸¹ In this, too, the Roosevelt administration failed.

Professor Einolf suggests the American experience with atrocities in the Philippines "did seem to affect US rule in the Philippines and the future of imperialist policy."³⁸² He suggests that the history of atrocities may have helped coalesce a commitment for the eventual freedom of the Philippines, and that the experience in the Philippines may have discouraged the further use of torture, both within the Philippines and in the other venues where America intervened.³⁸³

But neither the Lodge Committee nor the Army's internal reviews brought about a reform of the rules under which American armies took to the field where such reform was designed to minimize or prevent the occurrence of torture in the future, or to exercise rigorous care to prevent any cruelty or brutality.

Our experience in the Philippine-American War did inform a reworking of the Lieber code a decade later. Appropriate both because the Lieber code included lengthy provisions dealing with slavery and because of the need to harmonize the code with the provisions of the Geneva Convention of 1864 and the Hague Convention of 1899, the work began in 1913 and resulted in the 1914 publication of the *Rules of Land Warfare*.³⁸⁴

The *Rules of Land Warfare* was not intended to be a departure from the provisions of the Lieber code,³⁸⁵ and on the matter of torture it was not. The torture analysis started with Rule 10 of the Rules: "The object of war is to bring about the complete submission of the enemy as soon as possible by means of regulated violence."³⁸⁶ Rule 11 contained a broad—but not unlimited—recognition of military necessity: "Military necessity justifies a resort to all the measures which are indispensable for securing this object and which are not forbidden by the modern laws and customs of war."³⁸⁷

Taken in concert, Rules 10 and 11 might have permitted the military necessity defense advanced by Major Glenn, but for the clear language of Rule 13:

380. Roosevelt Memorial Day Address, *supra* note 13.

381. Cable from Major-General H.C. Corbin to Major-General Adna Chaffee (April 16, 1902), in CORRESPONDENCE RELATING TO THE WAR WITH SPAIN, *supra* note 14, at 1328.

382. EINOLF, *supra* note 64, at 170; *see also* JONES, *supra* note 8, at 350 ("America's dreams of empire had passed, buried forever beneath the fertile rice plains and forested peaks of the Philippines.").

383. EINOLF, *supra* note 64, at 170-71.

384. WAR DEP'T OFFICE OF THE CHIEF OF STAFF, RULES OF LAND WARFARE (1914), http://www.loc.gov/rr/frd/Military_Law/pdf/rules_warfare-1914.pdf [hereinafter 1914 RULES OF LAND WARFARE].

385. *See id.* at 7 ("It will be found that everything vital contained in G.O. 100 . . . has been incorporated in this manual. Wherever practicable the original text has been used herein, because it is believed that long familiarity with this text and its interpretation by our officers should not be interfered with if possible to avoid doing so.")

386. *Id.* at 14 (Rule 10).

387. *Id.* (Rule 11).

13. *What military necessity does not admit of.* Military necessity does **not** admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge . . . nor of torture to extort confessions³⁸⁸

Rule 13 cited and tracked Rule 16 of the Lieber Code.³⁸⁹ Also relevant to the torture analysis was Rule 58, which prohibited coercive interrogations:

Although a prisoner of war is bound . . . to state truthfully his name and rank, yet he is not bound to reply to other questions. The captor is entitled to take advantage of every means, humane and not coercive, in order to obtain all information possible from a prisoner with regard to the numbers, movements, and location of the enemy, but the prisoner can not be punished for giving false information about his own army.³⁹⁰

Rule 58 was very similar to Rule 80 of the Lieber Code.³⁹¹

The author of the *Rules of Land Warfare* deserves credit for rejecting the military necessity defense advanced by Major Glenn.³⁹² Although the author of the Rules was not credited in the published work, we know who he was. A lawyer and former law professor, he had served in the Philippines as a judge advocate and had been counsel of record defending one of the water torture defendants. He published a work on international law before the war. The author of the *Rules of Land Warfare* was none other than the highest-ranking officer convicted of water torture during the Philippine-American War, Edwin F. Glenn.³⁹³

V. CONCLUSION: “NO MORE THAN A MATTER OF OPPORTUNITY AND OCCASION”?

Almost sixty years ago Jean-Paul Sartre observed that in the water torture of Henri Alleg at the hands of French soldiers his countrymen were “discovering this terrible truth: that if nothing can protect a nation against itself, neither its traditions nor its loyalties nor its laws . . . then its behaviour is not more than a matter of

388. *Id.* (Rule 13).

389. *Compare id.* at 14, with Lieber code, *supra* note 189, Rule 16 (“Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge . . . nor of torture to extort confessions.”).

390. 1914 RULES OF LAND WARFARE, *supra* note 384, at 27.

391. Lieber code, *supra* note 189, Rule 80 (“Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information, or to punish them for having given false information.”).

392. WITT, *supra* note 34, at 364 (“[A]s for torture, [the author] faithfully reproduced precisely the section of the 1863 code that Judge Advocate General Davis had cited when he recommended that the president uphold Glenn’s . . . conviction and sentence. ‘Military necessity,’ the *Rules of Land Warfare* stated, ‘does not admit of . . . torture to extort confessions.’ Following Lieber’s Old Hundred, the *Rules* banned coercive means to obtain information from prisoners of war.”).

393. WITT, *supra* note 34, at 363 (Glenn as “primary author”). Professor Witt recognizes the irony:

The man the Army chose was none other than Edwin F. Glenn. If not for the torture conviction, Glenn would have been a natural choice for the job. He had a law degree and had served as a judge advocate. He had published a treatise on international law. And he had considerable experience with courts-martial, though not all of it good.

Id. at 362-63. It is hard to imagine what Mark Twain’s reaction would have been to Colonel Glenn’s authorship of the *Rules of Land Warfare*. Alas, Twain died four years prior to publication of Glenn’s work.

opportunity and occasion.”³⁹⁴ Going from Nazi atrocities in Paris to French crimes in Algiers, his nation learned that “fifteen years are enough to transform victims into executioners.”³⁹⁵

We went from torturer in the Philippine-American War, to victim in the Second World War and the Korean War,³⁹⁶ back to torturer in Viet Nam, Iraq, and Afghanistan. Was our behavior no more than a matter of opportunity and occasion?

It would seem that a significant beginning toward the protection of the nation would have been in 1902, and would be today, the fulfillment of President Roosevelt’s three imperatives, the first of which was to conduct a thorough, searching, and exhaustive investigation to discover and acknowledge any instances of cruelty and barbarity, with nothing concealed and no one shielded.

After the Philippine-American War, the nation failed to fulfill the imperative to fully investigate and disclose acts of torture. The Lodge Committee’s inquiry was inadequate, an unfocused exercise designed to forestall the targeted inquiry advocated by Senator Hoar and the anti-imperialist minority. A comprehensive investigation was thwarted by the inability to go to the Philippines, the failure to call the number and type of witnesses required to fully explore the record, and the unwillingness to reconvene when additional evidence was available. The multiple investigations launched by the War Department and the Army were not comprehensive and their results were not fully made public. After President Roosevelt declared the Philippine mission accomplished public interest waned, and even the beginnings of a broad accounting would have to wait one hundred and twelve years for the work of Professor Einolf.³⁹⁷

In dealing with our modern torture challenge we have repeated the failure of our ancestors on President Roosevelt’s first imperative. The Senate Intelligence Committee investigated the use of torture by the CIA and third-party agents, but the full Senate report remains classified.³⁹⁸

President Roosevelt’s second imperative was to uncover every case of cruelty and barbarity and bring every person responsible for them to justice. After the Philippine-American War, the nation failed to fulfill this imperative.³⁹⁹ Of all the officers and soldiers involved in water torture, only four were court-martialed. Of those who were court-martialed, only two were convicted. Of those convicted,

394. ALLEG, *supra* note 1, at xxviii.

395. *Id.*

396. Wallach, *supra* note 375, at 473 n.22 (1953 report of water torture of American by North Koreans).

397. Kramer, *supra* note 7 (“As the investigation of the water cure ended and the memory of faraway torture faded, Americans answered it with their silence.”).

398. Greg Miller, Adam Goldman & Julie Tate, *Senate report on CIA program details brutality, dishonesty*, THE WASHINGTON POST (Dec. 9, 2014), https://www.washingtonpost.com/world/national-security/senate-report-on-cia-program-details-brutality-dishonesty/2014/12/09/1075c726-7f0e-11e4-9f38-95a187e4c1f7_story.html?utm_term=.5200042c8580.

399. *Gen. Miles’s Report*, *supra* note 63 (“[General Miles] expresses the opinion that in some cases there is proof of outrages, with no sufficient punishment as a result.”). Secretary Root’s assessment was quite different, reflected in his 1903 statement that “there is one thing that the Republican Party will not do: It will not further seek to hound down officers and men of the Army . . . for everything which happened two years ago, and which have been tried by the courts and before the country.” JONES, *supra* note 8, at 344.

neither received a penalty that included prison time or discharge from the Army. Both of the officers convicted for water torture remained in the Army and had full careers: one ended his career a general, the other a colonel. Both are buried in Arlington Cemetery.⁴⁰⁰

In dealing with our modern torture challenge we have repeated the failure of our ancestors on President Roosevelt's second imperative. One of the findings of the Senate Select Committee on Intelligence was that individuals involved in water torture and other violations were not held accountable within the CIA for their actions.⁴⁰¹ Nor will they be held accountable outside the CIA. Declaring "[n]othing will be gained by spending our time and energy laying blame for the past," President Obama elected not to prosecute CIA officers for torture.⁴⁰²

President Roosevelt's final imperative was to take strong remedial measures to

400. *Id.* at 348 ("Theodore Roosevelt . . . never made good on his Memorial Day pledge to make 'a determined and unswerving effort . . . to find out every instance of barbarity on the part of our troops' and 'punish those guilty of it.'"). It should be noted that the record at the time of the Philippine-American War was not without instances of individual merit. For example, the Judge Advocate General, General George B. Davis, took some actions to condemn the practice of water torture and to hold the perpetrators accountable. Borch, *supra* note 11, at 12 ("Davis . . . took a public stand against those U.S. officials who defended the use of torture during military operations."). It is reported that General Davis' example is a model for Army lawyers in the present. *Id.* at 15 ("Davis' principled stand against torture and abuse continues to inspire Army lawyers wrestling with similar issues today.").

401. *Select Committee Report, supra* note 4, at 14 of Findings and Conclusions ("The CIA rarely reprimanded or held personnel accountable for serious and significant violations, inappropriate activities, and systemic and individual management failures.").

402. Jennifer Loven & Devlin Barrett, *CIA Officials Won't Be Prosecuted For Waterboarding, Obama Admin Says*, HUFFINGTON POST (May 17, 2009). In 2014, the Senate Select Committee on Intelligence released portions of its highly critical report. *Select Committee Report, supra* note 4. President Obama said the report "reinforces my long-held view that these harsh methods were not only inconsistent with our values as a nation, they did not serve our broader counterterrorism efforts or our national security interests." *Statement by the President Report of the Senate Select Committee on Intelligence*, The White House, Office of the Press Secretary (December 9, 2014). The President asserted "one of the strengths that makes America exceptional is our willingness to openly confront our past, face our imperfections, make changes and do better." *Id.* But even in light of the report, openly confronting our past and facing our imperfections apparently does not encompass fairly punishing torturers. President Obama's position remains that torturers should not be prosecuted: "[r]ather than another reason to refight old arguments, I hope that today's report can help us leave these techniques where they belong – in the past." *Id.* Allegations are now emerging of torture beyond that chronicled by the Senate Select Committee on Intelligence. David Rohde, *Detainee alleges CIA sexual abuse, torture beyond Senate findings*, REUTERS (June 2, 2015), <http://www.reuters.com/article/us-usa-torture-khan-idUSKBN00I1TW20150602> (reporting on declassified account of detainee Majid Khan of torture techniques and incidents, including water torture, not reported in the Senate report). In theory, Americans who engaged in torture could be prosecuted internationally. Mick Krever, *CIA agents who tortured are vulnerable to prosecution in "any country in the world," says U.N. official*, CNN (Sept. 26, 2016, 3:31 PM), <http://amanpour.blogs.cnn.com/2014/12/12/cia-agents-who-tortured-are-vulnerable-to-prosecution-in-any-country-in-the-world-says-u-n-official/>.

The only CIA officer imprisoned for crimes relating to the torture program is John Kiriakou, convicted for the unauthorized release of classified information about CIA operations to the press. Steve Coll, *The Spy Who Said Too Much: Why the Administration targeted a C.I.A. officer*, THE NEW YORKER (April 1, 2013). It is reported that "[n]ine U.S. Army soldiers have been court-martialed and convicted of crimes committed at Abu Ghraib prison . . ." Mark Follman and Tracy Clark-Flory, *Prosecutions and convictions: A look at accountability to date for abuses at Abu Ghraib and in the broader "war on terror,"* SALON (Mar. 14, 2006), http://www.salon.com/2006/03/14/prosecutions_convictions/. All are enlisted soldiers; eight of the nine received prison sentences. *Id.*

minimize or prevent future acts of cruelty and barbarity. After the Philippine-American War, the nation failed to fulfill this imperative as well. After combat operations wound down and President Roosevelt declared victory, public attention moved on. The largely Democratic anti-imperialist coalition found torture in the Philippines to be a weak election issue. Especially in the absence of a comprehensive disclosure of the incidents of torture, a public desire to further discuss the issue was wanting.

It is on President Roosevelt's final imperative that the contemporary record shows progress. At the beginning of his first term, President Obama issued an executive order restricting interrogation techniques to those authorized in the Army Field Manual.⁴⁰³ This protection was strengthened in 2015 with passage of a statutory limitation on interrogation techniques used on individuals "in the custody or under the effective control of an officer, employee, or other agent of the United States Government" or "detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict."⁴⁰⁴ The statute provides that such individuals "shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual 2-22.3."⁴⁰⁵

There was broad support for the statutory prohibition on torture; the Senate passed the torture amendment on a 78-21 vote.⁴⁰⁶ But Sartre's question was whether, on the issue of torture, a nation's laws, traditions, and loyalties can protect it from itself. Senator John McCain, who was tortured as a prisoner of war during the Vietnam War, suggested the importance of our national debate goes beyond the statutory enactments it produces:

[P]erhaps this is just a debate for the history books. But it is still important, because Americans in a future age, as well as their leaders, might face these same questions. We should do our best to provide them a record of our debates and decisions that is notable not just for its passion, but for its deliberativeness and for opinions that were informed by facts and formed with scrupulous care by both sides for the security of the American people and the success of the ideals we cherish. We have a duty to leave future American generations with a history that will offer them not confusion but instruction as they face their crises and challenges, and try to lead America safely and honorably through them.⁴⁰⁷

Senator McCain has been consistent in his opposition to waterboarding,⁴⁰⁸ in large measure because of the impact of the practice on America:

403. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009) https://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

404. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045(a)(2)(B).

405. *Id.* at § 1045(a)(2)(A).

406. Julian Hattem, *Senate votes to ban use of torture*, THE HILL (June 16, 2015), <http://thehill.com/policy/national-security/245117-senate-votes-to-permanently-ban-use-of-torture>.

407. John McCain, *Remarks by Senator John McCain on the Floor of the U.S. Senate on the Debate on the Use of Torture* (May 12, 2011), <http://www.mccain.senate.gov/public/index.cfm/floor-statements?ID=E496ACF5-A37F-1136-F1BE-F15D5E3D93E9>.

408. *Id.* ("I believe some of these practices—especially waterboarding, which is a mock execution, and thus to me, indisputably torture—are and should be prohibited in a nation that is exceptional in its defense and advocacy of human rights.").

[I]t is difficult to overstate the damage that any practice of torture or cruel, inhuman and degrading treatment by Americans does to our national character and historical reputation – to our standing as an exceptional nation among the countries of the world. It is too grave to justify the use of these interrogation techniques. America has made its progress in the world not only by avidly pursuing our geopolitical interests, but by persuading and inspiring other nations to embrace the political values that distinguish us. As I’ve said many times before, and still maintain, this is not about the terrorists. It’s about us.⁴⁰⁹

But Sartre’s observation after the French water torture of Henri Alleg at El-Biar—“There is no such word as impossible”—is also true for us.⁴¹⁰ There is renewed support for water torture in our national debates.⁴¹¹

It has been argued that, when confronted by the specter of torture in the Philippine-American War, we were dishonored in part because we forgot the righteous history of the Civil War that produced our code of conduct:

Lincoln’s fierce code seemed to have lost its way in the Philippines. A dubious war of empire had detached the code from the righteous cause that had produced it. . . . Senator George Frisbie Hoar . . . could only bemoan his country’s new direction: “We have been brought to the unexampled dishonor of disregarding our own rules. . . for the conduct of armies in the field.”⁴¹²

Similarly, it was argued by Senator Feinstein that when confronted by the specter of torture in our present-day national life we forgot who we are and the lessons of our history:

[P]ressure, fear, and expectation of further terrorist plots do not justify, temper or excuse improper actions taken by individuals or organizations in the name of national security. The major lesson of this report is that regardless of the pressures

409. *Id.*

410. ALLEG, *supra* note 1, at xxvii.

411. As a candidate, President Donald J. Trump enthusiastically endorsed waterboarding:

“Would I approve waterboarding? You bet your ass I would – in a heartbeat,” [Donald]

Trump said to loud cheers during a rally at a convention center here Monday night that attracted thousands. “And I would approve more than that. Don’t kid yourselves, folks.

It works, okay? It works. Only a stupid person would say it doesn’t work.”

Jenna Johnson, *Donald Trump on waterboarding: ‘If it doesn’t work, they deserve it anyway,’* THE WASHINGTON POST (Nov. 23, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/>. The same candidate allowed that he would approve waterboarding as punishment even if the practice was not a productive interrogation technique: “It works,” Trump said over and over again. “Believe me, it works. And you know what? If it doesn’t work, they deserve it anyway, for what they’re doing. It works.” *Id.*

An unsuccessful candidate for the Republican Presidential nomination adopted a more nuanced position. He started by rejecting the use of torture: “We can defend our nation and be strong and uphold our values,” [Ted Cruz is quoted as saying]. “There is a reason the bad guys engage in torture. ISIS engages in torture. Iran engages in torture. America does not need to torture to protect ourselves.” Michael Warren, *Cruz: ‘America Does Not Need Torture to Protect Ourselves,’* THE WEEKLY STANDARD (Dec. 3, 2015), <http://www.weeklystandard.com/cruz-america-does-not-need-torture-to-protect-ourselves/article/2000049>. But the same candidate “doesn’t think waterboarding meets the traditional definition of torture . . .”, although he would not “bring it back in any sort of widespread use.” Nick Gass, *Cruz: Waterboarding is not torture*, POLITICO (Feb. 6, 2016), <http://www.politico.com/blogs/new-hampshire-primary-2016-live-updates/2016/02/ted-cruz-waterboarding-2016-debate-218879>.

412. WITT, *supra* note 34, at 361.

and the need to act, the Intelligence Community's actions must always reflect who we are as a nation, and adhere to our laws and standards. It is precisely at these times of national crisis that our government must be guided by the lessons of our history and subject decisions to internal and external review.⁴¹³

A hundred and fourteen years before Senator Feinstein wrote those words, another Senator rose as the nation was descending into error and made a similar plea to the Senate and the nation. Senator George Frisbie Hoar implored the nation "to take your bearings, as of old, from the north star . . . and not from this meteoric light of empire," and said:

I stand here to-day to plead with you not to abandon the principles that have brought these things [the defeat of Spain and the liberation of Cuba] to pass. I implore you to keep to the policy that has made the country great . . . Especially, if I could, would I persuade the great Republican party to come back again to its old faith, to its old religion, before it is too late. There is yet time The old, safe path alike of justice and of freedom, is still easy. It is a path familiar, of old, to the Republican party. If we have diverged from it for the first time, everything in our history, everything in our own nature, calls us back.⁴¹⁴

His call went unheeded by the Republican party and the nation.

The answer to Jean-Paul Sartre's question surely must be that the only things that can protect us on the matter of torture are our traditions, loyalties, and laws. But our traditions, loyalties, and laws cannot remain the product of inattention and a persistent failure to confront and challenge our participation in torture. If our behavior is to be more than a matter of opportunity and occasion, then we ought to have followed the path declared but not followed by President Roosevelt: fully investigate and disclose episodes of torture by our soldiers and agents, fairly punish all of those responsible for torture, and take decisive action to minimize and eliminate future torture by those acting in our name.

413. *Select Committee Report*, *supra* note 4, at page 2 of Forward.

414. Hoar, *The Lust of Empire*, *supra* note 34, at 6-7.